89-676

Supreme Court, U.S.
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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

LEOZIE PEARSON, JR. and CAROL PEARSON,

Petitioners,

vs.

HARRISON DUCK,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. May a private person alone, or acting in conspiracy with a state actor, violate the "full and equal benefit" or the "like punishment" provisions of 42 U.S.C. Section 1981, even if that private person could not alone cause all of the resulting harm to the victims?

2. Do the "full and equal benefit" or "like punishment" provisions of 42 U.S.C. Section 1981 provide for a race-based, malicious prosecution type of action against a private individual, who, acting alone or in conspiracy with a prosecutor, pursues non-meritorious criminal charges against another private individual for racial and ulterior purposes?

3. Do the "like punishment" and the related portions of 42 U.S.C. do more than simply remove any legal disabilities from Afro-Americans to sue, be a party, testify, or enforce a contract, by statutorily providing that punishment, pains, penalties, taxes, licenses, and exactions of every kind shall not be based on one's race?

4. Must a plaintiff join an immune state actor, when bringing an action against a private individual, who has conspired with that state actor to violate 42 U.S.C. Section 1981?

5. Should an appellate court sustain the dismissal of a complaint for failure to join a party, or for failure to sufficiently allege a conspiracy with a state actor, when neither such defense was raised in the defendant's 12(b) motion, and the plaintiffs filed a 56(f) affidavit on the state action issue?

6. Should the trial court on remand reconsider exercising jurisdiction over the pendent state claims, if the federal claim is reinstated?

STATEMENT OF INTERESTED PARTIES

All interested parties are listed in the caption of this case.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Leozie Pearson, Jr. and Carol Pearson, husband and wife, plaintiffs and appellants in the proceedings below, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit filed on the 4th day of April, 1989, rehearing denied on the 27th day of July, 1989.

OPINIONS BELOW

The opinion of the Sixth Circuit Court of Appeals filed on April 4, 1989, and that Court's denial on July 27, 1989, of the Pearsons' request for rehearing is reproduced in the accompanying Appendix. (A. 106, 112). The memorandum opinions and orders of the United States District Court for the Northern District of Ohio,

filed on September 21, 1987, September 24, 1987, and December 31, 1987, are also reproduced in the accompanying Appendix. (A. 66, 78, 79, 81, 105).[1]

JURISDICTION

The judgment of the Court of Appeals was filed on April 4, 1989. Petitioners' petition for rehearing and/or rehearing en banc was denied on July 27, 1989. This petition, pursuant to Rule 28.2 of the Rules of the Supreme Court of the United States, was filed within 90 days. The jurisdiction of this Court is founded on 28 U.S.C. Section 1254(1).

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[1] References to pages of the accompanying Appendix will be cited as "(A. ___)."

STATUTES INVOLVED

42 U.S.C. Section 1981. Equal rights under the law:

> "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

STATEMENT OF THE CASE

Since this case was dismissed on a 12(b) motion, the appellate courts must deem the facts to be as alleged by the Petitioners in their Complaint. Estelle v. Gamble, 429 U.S. 97 (1976).

Petitioners, Leozie Pearson, Jr. and Carol Pearson (hereinafter the "Pearsons"), husband and wife, are

Afro-Americans residing in East Liverpool, Ohio. The Pearsons have a teenage son, Leozie Pearson, III. Respondent, Harrison Duck, a white male, also resided in East Liverpool. Duck has a teenage daughter, Kelly Duck. (Complaint, paras. 2-3, 7-8)(A. 14-15).

Sometime prior to September, 1983, the black son and white daughter commenced an interracial friendship. Both sets of parents disagreed with and attempted to break up this friendship. Nevertheless, the white daughter continued to call the Pearsons' residence for their son, but would hang up, if anyone other than the son answered. Duck asserted that the Pearsons' son used this same technique, when attempting to call Kelly Duck. Both the teenagers desired the telephone calls from each other.

Following a meeting by both sets of parents, Mr. Pearson directed his son to cease making telephone calls to the Duck residence and strongly disciplined his son regarding his prior calls. Nevertheless, Duck knew, or should have known, that his daughter was continuing to make such calls to the Pearsons' son after the parental meeting. (Complaint, para. 16-23) (A. 19-23). Duck knew, or should have known, that any calls from the Pearsons' residence to Kelly Duck were not for harassment purposes. (Complaint, para. 19) (A. 20-21).

Having failed to stop the interracial friendship, Duck shortly before September 16, 1983, and in a further effort to end the relationship, brought telephone harassment criminal charges with the City of East Liverpool, Ohio,

against Leozie Pearson, Jr., the father, alleging that the father was responsible for harassing telephone calls by his son to the Duck residence. Duck continued to encourage and conspired with the Law Director and City Solicitor of East Liverpool to pursue these criminal charges against Mr. Pearson. (Complaint, paras. 9, 11, 26)(A. 15-17, 24).

On March 8, 1984, Leozie Pearson, Jr., the father, was found guilty by the Municipal Court of telephone harassment and sentenced to thirty (30) days in jail and fined Two Hundred Fifty Dollars ($250), though these penalties were suspended with costs charged against Mr. Pearson. On June 25, 1985, an Ohio appellate court reversed Mr. Pearson's criminal conviction finding that Ohio's "speedy trial" provisions had not been

complied with and that the State had failed in its burden of proof to establish the crime.[2]

After East Liverpool began pursuing the criminal charges against her husband, Mrs. Pearson attempted to bring similar telephone harassment charges against Duck based upon similar allegations due to his daughter's continuing calls to the Pearson residence. However, the City, allegedly in conspiracy with Duck, not only refused to pursue Mrs. Pearson's charges against Duck, it pursued additional criminal telephone harassment charges in 1984 against her Afro-American

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[2]While the state appellate court's reversal was based upon the "speedy trial" provisions, the appellate court, which under Ohio law must rule on all assignments of error, see Section 2505.21 of the Ohio Revised Code, also found that the criminal conviction was against the manifest weight of the evidence. (A. 10, 12).

son (though not against the white daughter). (Complaint, para. 24-26) (A. 23-24).

On June 23, 1987, the Pearsons, relying on 28 U.S.C. Sections 1331, 1343, 2201, and 42 U.S.C. Section 1988, brought an action against Duck in United States District Court for the Northern District of Ohio. In their first cause of action, the Pearsons alleged that Duck, individually and in conspiracy with the City, deprived them, because of their race, of their statutory rights to sue, be parties, give evidence, and to their statutory right to the full and equal benefit of all laws and proceedings for the security of persons and property as enjoyed by white persons, as protected by

42 U.S.C. Section 1981.[3] In part, the Pearsons alleged that they were denied the "full and equal benefit" of the laws and were not subjected to "like

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[3]While the Pearsons also alleged an "interference with contract" type of claim under Section 1981, regarding the additional burdens placed on their enjoyment of their telephone contract, they are not seeking to appeal that portion of their dismissed Complaint. The Pearsons also brought three state tort actions, an interference with contract claim, Mrs. Pearson's loss of consortium of her husband, and her loss of consortium of her son. If that portion of the Section 1981 claim, that is being appealed, is reinstated, the Pearsons also seek on appeal a reconsideration of the discretionary dismissal of their pendent state claims, particularly since a state trial court has since dismissed these state claims. The state torts were re-filed in state court after the federal trial court declined to exercise pendent jurisdiction after dismissing the federal claim. The state court then dismissed the re-filed state torts since, in its view, the federal action had resolved the state, as well as, federal claims.

punishment" of the laws because Duck, individually and in conspiracy with the City, processed to trial criminal telephone harassment charges against Mr. Pearson, while conspiring to deny the Pearsons the same benefit to pursue similar charges against and/or obtain like punishment for Duck, when the Pearsons sought to pursue a similar criminal action against Duck. (A. 13-35).

Rather than filing an Answer to the Complaint, Duck, pursuant to Rule 12(b) of the Federal Rules of Civil Procedure, filed a motion to dismiss. Duck argued that the Complaint was time barred. Duck also argued that the Complaint should be dismissed, since the Pearsons did not allege that they had been denied their right to contract, and since the

Pearsons failed to allege that similarly situated individuals of the opposite race were treated different from them. Duck further construed the Complaint as raising independent constitutional torts and, therefore, argued that the alleged Fifth and Fourteenth Amendments claims were not supported by the requisite "state action". Duck asserted that an independent constitutional tort could not be pursued under Sixth Circuit law and that the constitutional torts were also time barred. (A. 36-39).[4]

In his 12(b) motion, Duck did not argue that the Pearsons insufficiently described the conspiracy between the City

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[4]The Pearson's position, that they had not brought independent constitutional torts, was sustained by the trial court. (A. 101-03).

and Duck, nor did Duck argue in his motion that there was a "state action" component to Section 1981 (as opposed to the alleged constitutional torts). Thus, Duck should not be permitted to raise these arguments on appeal.

Nevertheless, the Pearsons instituted discovery that in part sought information related to Duck's "state action" defense to the constitutional torts. Such discovery would also be relevant to any "state action" defense to the Section 1981 claim. An affidavit, pursuant to Rule 56(f) of the Federal Rules of Civil Procedure, regarding inter alia the "state action" outstanding discovery request (which was attached to the affidavit), was filed by the Pearsons. (A. 40-65).

Initially, the trial court dimissed the Complaint solely on statute of

limitations grounds. (A. 76). However, after being informed by Duck that the Sixth Circuit had recently changed its position on the statute of limitations for a Section 1981 action, the trial court vacated its judgment and sought further briefing on the limitations issue from the parties. (A. 79-80).

On December 31, 1987, the trial court found that the Complaint was timely filed, though dismissed the Section 1981 claim for failure to state a claim. The trial court reasoned that there were no allegations of interference with their telephone service. (A. 81, 96, 99-101). However, the trial court did not address the other arguments raised by the Pearsons, regarding the "equal benefit" or "like punishment" portions of Section 1981. (A. 81-104). Having dismissed the

federal claim, the trial court declined to exercise pendent jurisdiction over the state tort actions. (A. 102).

On appeal the Sixth Circuit upheld the dismissal of the Complaint. Unlike the trial court, the Sixth Circuit addressed the Pearsons' "equal benefit" and "like punishment" arguments. Despite the Rule 56(f) affidavit, the Sixth Circuit rejected the Pearsons' arguments, because Duck "alone" could not have caused the Pearsons' harm:

> "The Pearsons also claim that the trial judge did not address their claims of violation of the 'full and equal benefits' and 'like punishment' provisions of section 1981. However, it should be kept in mind that, although the Pearsons have alleged deprivations of the 'full and equal benefits' and 'like punishment' clauses of section 1981, as well as denial of their rights to sue and be parties, they have named only Duck as a defendant in this suit. If there is an unfairness in the fact that Pearson was prosecuted for conduct

> apparently similar to that for which Duck was not prosecuted, it cannot be blamed on Duck alone. The Pearsons imply that Duck and the Law Director and/or Solicitor General conspired to deprive them of their rights. However, the Law Director and/or Solicitor General is not named in the suit; and Duck alone could not have caused this type of harm."

(Emphasis in original) (A. 111). While the Sixth Circuit found "many of the actions surrounding this case to be reprehensible," it "did not think that the actions brought by the Pearsons are the proper means for redressing the situation." (A. 111).

Since the Pearsons believe Section 1981's "equal benefit" and "like punishment" provisions are an appropriate vehicle for seeking redress of Duck's reprehensible actions and further believe that the test applied by the Sixth Circuit, regarding whether Duck acting

"alone" could have caused the Pearson' harm, was inconsistent with this Court's prior precedents, the Pearsons timely sought a rehearing and/or rehearing en banc. This request was denied on July 27, 1989. (A. 112).

REASONS FOR GRANTING THE WRIT

A. A PRIVATE PERSON ACTING IN CONCERT WITH A STATE ACTOR MAY VIOLATE THE "FULL AND EQUAL BENEFITS" AND/OR "LIKE PUNISHMENT" PROVISIONS OF 42 U.S.C. SECTION 1981.

It is now settled law that Section 1981 reaches private conduct and that a private cause of action exists to enforce at least the "make and enforce contracts" provision of this statute. Patterson v. McLean Credit Union, 491 U.S. ___ (1989); Runyon v. McCrary, 427 U.S. 160 (1976);

see, Jett v. Dallas Independent School District, 109 S.Ct. 2702, 2724 (1989). This case deals with the extent to which the "full and equal benefit" of all laws and the "like punishment" provisions of Section 1981 reach private conduct.

The Pearsons alleged that Duck conspired with a state actor, the Law Director and/or Solicitor General of East Liverpool, Ohio, to deny them their full and equal benefits of all laws and to subject them to unlike punishments, because of their Afro-American race. The Pearsons alleged that they were denied equal benefits and subjected to unlike punishments, when East Liverpool at Duck's continual urging pursued criminal telephone harassment charges against Mr. Pearson, the father, while refusing to pursue similar criminal charges against the white father.

When Duck filed his 12(b) motion to dismiss the Complaint, he did not allege that the Pearsons insufficiently alleged this conspiracy, nor did he argue that there was a "state action" component to Section 1981. While the Pearsons raised the "equal benefit" and "like punishment" provisions in their Complaint and in their opposition to the 12(b) motion, the trial court did not address this issue. However, the Sixth Circuit upheld the dismissal of the Complaint's allegations, regarding equal benefits and the like punishment allegations, because the Pearsons did not name, as a party, the Law Director and/or Solicitor General, and because, according to the Sixth Circuit, Duck "alone" could not have caused the harm to the Pearsons. Apparently, the Sixth Circuit believed

that the Law Director or Solicitor General were indispensable parties, and/or that, even if Duck conspired with these state actors, he could not be held liable for his co-conspirators actions.

The Sixth Circuit's decision is in conflict with this Court's holding that the Law Director and/or Solicitor General are not indispensable parties, Dennis v. Sparks, 449 U.S. 24 (1980), and this Court's holding that a private individual involved in a conspiracy with state actors, all of whom were absolutely immune, can still be sued under federal civil rights statutes. Tower v. Glover, 467 U.S. 919 (1984). Therefore, the Sixth Circuit's decision cannot be sustained based upon an allegation that the prosecuting state actors, who are absolutely immune in this type of federal

action, were not joined as parties. If Duck acted in conspiracy with immune state actors, he still may be subjected to liability under Section 1981. Id.

The Sixth Circuit's decision also should not stand on the basis that the Pearsons did not establish, or sufficiently allege, state action and/or a conspiracy with a state actor. The 12(b) motion did not challenge the sufficiency of the conspiracy allegation. Consequently, there was no reason for the Pearsons to even address this issue, when they opposed the 12(b) motion. Indeed, Duck may have waived his right to raise this issue by failing to include it in his 12(b) motion. Brule v. Southworthz, 611 F.2d 406 (1st Cir. 1979).

Nevertheless, the Rule 56(f) affidavit should have prevented the

dismissal of the Complaint on a "state action" basis. At best, the trial court (even if it had been presented with and considered such a defense), should have required a more definite statement, rather than dismissing the action. Innovative Digital Equipment, Inc. v. Quantum Technology, Inc., 597 F.Supp. 983 (N.D. Ohio 1984).

Since Duck could have acted "under color of law" by conspiring with the prosecutor, Briscoe v. LaHue, 460 U.S. 332, 331n.7 (1983), the Pearsons sufficiently stated a claim under the "equal benefit" and/or "like punishment" provisions of Section 1981, even though they did not name the prosecuting attorneys as parties. Id. The Pearsons submit that these provisions of Section 1981 permit an action against a private

party that is similar in nature to a state tort, race-based, malicious prosecution action. See, Bouquette v. Clemmer, 626 F.Supp. 46, 49-50 (S.D. Ohio 1985). Consequently, if Duck initiated, participated in, conspired with, and/or encouraged the continued pursuit of a criminal action against Mr. Pearson, and then his son, because of the Pearsons' race, while successfully conspiring with the prosecuting attorney to prevent the same type of criminal action against him (despite similar activity by his white daughter), a cause of action has been stated under Section 1981. Id.

While the Pearsons recognized that Duck alone could not have processed the criminal charges through trial without the assistance of the State, this should not result in a dismissal of the

Complaint. Once a person becomes a member of a conspiracy, that person is responsible for all that may be or has been done by his co-conspirators. United States v. Adamo, 742 F.2d 927, 943-44 (6th Cir. 1984); United States v. Lester, 363 F.2d 68 (6th Cir. 1966); Brown v. United States, 204 F.2d 247 (6th Cir. 1953).[5] Thus, if Duck was part of a conspiracy, he can be held responsible, as well, for the State's actions.

A writ of certiorari should be granted to further establish the substantive federal law regarding the extent to which the "equal benefit" and

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[5]Since the conspiracy provisions in 18 U.S.C. Section 242 should be read co-extensively with the civil provisions of federal civil rights statutes, Dennis, supra at 29n.5, these criminal cases may be relied upon for establishing guidelines regarding civil conspiracies.

"like punishment" provisions of Section 1981 reach private conduct. The Writ also should be granted, so that this Court can reaffirm that Section 1981 reaches private conduct, even when that private conduct alone may not cause all of the harm, when that conduct is part of a conspiracy with a state actor.

B. THERE IS NOT A "STATE ACTION" COMPONENT TO THE "EQUAL BENEFIT" AND/OR "LIKE PUNISHMENT" PROVISIONS OF 42 U.S.C. SECTION 1981.

Alternatively, the Pearsons submit that, even if they had not sufficiently alleged a conspiracy with a state actor, or even if they had not submitted a 56(f) affidavit regarding the "state action" issue, they sufficiently stated a claim under the "equal benefit" and/or "like punishment" provisions of Section 1981,

because there is no "state action" requirement for any of Section 1981's protections. The Pearsons recognized that the lower courts are split on this issue and that this Court may not yet have resolved this issue. Compare, Runyon, supra; Gannon v. Action, 303 F.Supp. 1240 (E.D. Miss. 1969), aff'd on other grounds, 450 F.2d 1227 (8th Cir. 1971); Central Presbyterian Church v. Black Liberation Front, 303 F.Supp. 894 (E.D. Miss. 1969), with, Hall v. Pennsylvania State Police, 570 F.2d 86, 91 (3d Cir. 1978); Mahone v. Waddle, 564 F.2d 1018 (3d Cir. 1977), cert. denied, 438 U.S. 904 (1978); Shaare Tefilia Congregation v. Cobb, 606 F.Supp. 1504 (D. Md. 1985).

A comparison of the language in Section 1981 with its companion statute,

42 U.S.C. Section 1983, clearly establishes that Congress knew how to inject a "state action" and/or "color of law" component, when it so chose. Since Congress did not explicitly insert a state action and/or color of law requirement, when it reenacted Section 1981, this statute should not be interpreted as requiring such state action, even for claims brought under the "equal benefit" and/or like punishment" provisions. Indeed, if there is no "state action" requirement to these provisions of Section 1981, the Pearsons submit that, as with any malicious prosecution types of action, their race-based, federal claims should be permitted to proceed, even if Duck "alone" could not have caused all of their harm. See, Douglas v. Allen, 56 Ohio St. 156 (1897);

Weist v. Toledo Newspaper Co., 182 N.E. 143, 144 (Ohio App. 1930); Bouquette, supra.

A writ of certiorari should be granted to further clarify the substantive federal law regarding the extent to which the "equal benefit" and/or "like punishment" provisions of Section 1981 reach private conduct and to resolve the conflict between the circuits as to whether there is a "state action" component to these provisions of Section 1981.

CONCLUSION

A writ of certiorari should be issued to review the judgment of the Court of Appeals so as to (1) establish that Section 1981 proscribes private conduct, even when that conduct alone may not

cause all of the victim's harm; (2) establish that a private individual may violate the "full and equal benefit" and/or "like punishment" provisions of Section 1981 when he acts in concert with and/or in conspiracy with a state actor; and (3) resolve the split between the circuits as to whether or not these provisions of Section 1981 have a "state action" component.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit was forwarded by regular U.S. mail, postage prepaid, to John E. Holcomb and Keith L. Pryatel, MILISOR & NOBLE, 430 Quaker Square, Akron, Ohio 44308, Attorneys for Respondent, on this _____ day of October, 1989.

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STATE OF OHIO, COLUMBIANA COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO,	)	
PLAINTIFF-APPELLEE,	)	OPINION
-VS-	)	CASE NO. 84-C-14
LEOZIE PEARSON,	)	
DEFENDANT-APPELLANT.)		

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J. Michael Kapp, 128 W. Fifth St., P.O. Box 768, East Liverpool, Ohio 43920 for Defendant-Appellant.

Hon. Joseph Donofrio,
Hon. Edward A. Cox,
Hon. Joseph E. O'Neill, JJ.

Dated: June 25, 1985

COX, J.

This appeal arises from a judgment of the East Liverpool Municipal Court finding defendant-appellant, Leozie Pearson, guilty of telephone harassment, a misdemeanor of the first degree under R.C. 2917.21(A)(1). Trial was had to the court without a jury.

The issues presented are: (1) whether the time within which appellant was required by R.C. 2945. 71, et seq. to be brought to the trial expired prior to his purported waiver of the statutory mandate; and (2) whether the State so failed in its burden of proof that the trial court's judgment was against the manifest weight of the evidence. The facts giving rise to these issues are as follows:

Appellant was served with summons and a complaint for telephone harassment on September 16, 1983. On September 19, he appeared for arraignment, pled not guilty, and the court set a pretrial for October 19. However, the record discloses that neither a pretrial nor a trial went forward on that date. The record does not disclose the reasons for this continuance.

The next entry of record was on January 4, 1984. At that time appellant appeared with counsel and executed what purports to be a waiver of the speedy trial provisions of R.C. 2945.71 et seq., as well as a motion for continuance of his trial until February 13, 1984.

On February 13, immediately before trial commenced, the State moved for a continuance and mistakenly represented,

the case was still within the ninety day rule but would be out of time the next day.

Appellant opposed this motion and countered with a motion for dismissal arguing that the ninety day period within which the State was required to try him had expired on December 18, 1983.

The transcript of this proceeding clearly shows an inquiry by the trial court directed to both parties as to why the case had been continued thus far and nothing that the record was unclear in this regard. Nonetheless, the court granted the State's motion for continuance and set trial for February 21, 1984. The court also overruled appellant's motion for dismissal, the reasons for this continuance.

On February 21, the case in issue was again continued until March 8, and again the court failed to journalize an entry setting forth the reasons for this latest continuance.

Finally, on March 8, trial of the matter went forward. Both parties presented evidence and at the conclusion of the case, the trial court found appellant guilty. This appeal followed.

Appellant's first contention is that the trial court erred in failing to dismiss the case against him as the State had failed to bring him to trial in a timely manner pursuant to statute. We agree.

The State flatly concedes appellant was not tried within the ninety days required for this first degree misdemeanor pursuant to R.C.

2945.71(B)(2). However, it contends the delay was occasioned by the unavailability of appellant's counsel and in part relies upon the ambiguities in the record to make such a bare assertion. Further, the State contends appellant affirmatively selected his own trial date at his January 4, 1984 appearance and, therby, apparently waived the lack of a speedy trial.

The case law relied upon by the State is inapplicable and factually distinguishable from the case sub judice.

The law of Ohio has found clear expression in a string of decisions by the Ohio Supreme Court. A trial court may grant a reasonable continuance other than on the accused's own motion but:

> "The record of the trial court must in some manner affirmatively

demonstrate that a sua sponte continuance by the court was reasonable in light of its necessity or purpose. Mere entries by the trial court will ordinarily not suffice, except when the reasonableness of the continuance cannot be seriously questioned. Although this burden is contrary to the presumption of regularity generally accorded to trial proceedings, it appears necessary to carry out the purpose of the speedy-trial statutes." State v. Lee (1976), 48 Ohio St. 2d 208 at 209. (Emphasis added)

"* * * practices which undercut the implementation of the 'speedy trial' provisions within R.C. 2945.71 and 2945.73 must not be employed to extend the requisite time periods." State v. Pudlock (1975), 44 Ohio St. 2d 104 at 106. (Emphasis added).

The burden of guaranteeing a defendant a timely trial:

"* * * rests upon the prosecution and trial courts and that a defendant is not required to either demand a timely trial or object to a trial setting outside the periods set forth in R.C. 2945.71 and is to be accorded the benefits of time limitations prescribed therein." State v. Wentworth (1978), 54 Ohio St. 2d 171 at 173. (Emphasis added)

Thus, in terms of just the initial continuance from October 19, 1983, both the trial court and the prosecution failed to affirmatively demonstrate on the record that the continuance was reasonable. The trial court itself noted at the February 13, 1984 hearing that the record was unclear in this regard. We find the syllabus of State v. Mincy (1982), 2 Ohio St. 3d 6 dispositive:

> "When sua sponte granting a continuance under R.C. 2945.72(H), the trial court must enter the order of continuance and the reasons therefore by journal entry prior to the expiration of the time limit prescribed in R.C. 2945.71 for bringing a defendant to trial." (Emphasis added)

However, this does not end our inquiry. We must also address the effect of appellant's purported wavier of a speedy trial signed beyond the time for a

speedy trial. In short, this waiver is ineffective to resurrect the time within which the State could proceed to try appellant. Once the ninety day time limit had passed, there was nothing for appellant to waive. To hold otherwise would run afoul of the Pudlock, supra, view that such practices must not be employed to undercut the implementation of the speedy trial provisions.

A case most directly dealing with this latter point is Westlake v. Cougil (1978), 56 Ohio St. 2d 230. There the Cuyahoga County Court of Appeals discharged a defendant's conviction on the grounds his purported waiver of a speedy trial was in fact executed after the time had already passed for a timely trial.

In reversing, the Ohio Supreme Court agreed with the dissenting appellate judge that such a holding was erroneous solely because the majority had incorrectly computed the time within which the State had to proceed against the defendant.

While the Supreme Court did not squarely face the exact issue here, we do not believe their holding would be any different. Accordingly, this assignment of error is sustained.

Appellant next contends the trial court erred in its finding of guilt as that finding was against the manifest weight of the evidence.

We also find this assignment of error to be meritorious but reverse on the basis of the first assignment of error.

For the reasons stated, the assignments of error are sustained. The judgment of the trial court is reversed and the appellant discharged as provided in R.C. 2945.73(B).

Donofrio, P.J., concurs.

O'Neill, J., concurs.

APPROVED:

Edward A. Cox

EDWARD A. COX, JUDGE

STATE OF OHIO	)	IN THE COURT OF
	) SS:	APPEALS OF OHIO
COLUMBIANA COUNTY)		
		SEVENTH DISTRICT
STATE OF OHIO,	)	
	)	JOURNAL ENTRY
PLAINTIFF-APPELLEE	)	
	)	CASE NO. 84-C-14
-VS-	)	
	)	
LEOZIE PEARSON,	)	
	)	
DEFENDANT-APPELLANT)		

For the reasons stated in the opinion rendered herein, the assignments of error are sustained, and it is the final judgment and order of this Court that the judgment of the Municipal Court of East Liverpool, Ohio, is reversed and the appellant discharged. Costs to be taxed against plaintiff-appellee.

Joseph Donofrio

Edward A. Cox

Joseph E. O'Neill

JUDGES.

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

LEOZIE PEARSON, JR. 1182 Pennsylvania Avenue East Liverpool, OH 43920	CASE NO. C87-1566Y
and	JUDGE DOWD
CAROL PEARSON 1182 Pennsylvania Avenue East Liverpool, OH 43920	COMPLAINT FOR DECLARATORY RELIEF AND DAMAGES
Plaintiffs -vs-	
HARRISON DUCK 276 Canton East Liverpool, OH 43920	(JURY DEMAND ENDORSED HEREON)
Defendant	

FIRST CAUSE OF ACTION

1. This Court has jurisdiction of the claims alleged herein pursuant to 28 U.S.C. Section 1331, 28 U.S.C. Section 1343, 28, U.S.C. Section 2201, et seq., 42 U.S.C. Section 1988, and the Fifth Amendment to the United States Constitution. This civil

action arose under the Constitution and laws of the United States. Plaintiffs are alleging a violation of their rights under 42 U.S.C. Section 1981, and the First, Fifth, and Fourteenth Amendments to the United States Constitution.

2. Plaintiff, Leozie Pearson Jr., is a citizen of the United States, he is an adult member of the black race, and is a resident of East Liverpool, Ohio.

3. Plaintiff, Carol Pearson, is a citizen of the United States, she is an adult member of the black race, she is a resident of East Liverpool, Ohio, and she has been the wife of Plaintiff Leozie Pearson, Jr. during all relevant times in this lawsuit.

4. Hayes Taylor, at all pertinent times hereto, has been an agent of and employed by the City of East Liverpool as

City Law Director with supervisory authority over Charles L. Payne.

5. Charles L. Payne, at all pertinent times hereto, has been an agent of and employed by the City of East Liverpool as the City Solicitor.

6. Defendant Harrison Duck, an individual, resides at 276 Canton, East Liverpool, Ohio 43920.

7. At all times pertinent to this case, Leozie Pearson III was a juvenile black male. Leozie Pearson III is the son of Plaintiffs.

8. At all times pertinent to this case, Kelly Duck was a juvenile white female. Kelly Duck is the daughter of Defendant Duck.

9. Sometime prior to September 16, 1983, on a date uncertain to Plaintiffs, Defendant, acting under color of state

law, filed a charge and/or complaint with the East Liverpool City Law Director and/or the City Solicitor alleging that Plaintiff Leozie Pearson, Jr. was responsible for harassing phone calls from Plaintiffs' residence to Defendant's residence and therafter continued to encourage the Law Director and City Solicitor to pursue criminal charges against Defendant Leozie Pearson, Jr.

10. On or about September 16, 1983, and as a result of the actions initiated by Defendant, Plaintiff Leozie Pearson, Jr. was served with a Summons and Complaint alleging that said Plaintiff did make or cause to be made or permit a telephone call or calls to be made from a telephone under his control for the purpose to abuse, threaten, annoy, or harass another person.

11. The Summons and Complaint was filed by or under the supervision of Hayes Taylor and Charles L. Payne on behalf of the City of East Liverpool and the State of Ohio as a result of a charge and/or complaint from Defendant Duck. The case, which is known as State of Ohio v. Leozie Pearson, Case No. 84-C-14, was brought in the Municipal Court of East Liverpool, Ohio.

12. On March 8, 1984, the Complaint was amended to read that Plaintiff Leozie Pearson, Jr. "'. . . did knowingly make or cause to be made a telephone call or knowingly permitted a telephone call to be made from a telephone under his control to another and said caller failed to identify himself to the recipient of the telephone call and made the telephone call with purpose to harass, abuse or

annoy any person at the premises to which the telephone call was made, whether or not conversation takes place during the telephone call,' in violation of Section 2917.21(A)(1) of the Ohio Revised Code, a misdemeanor of the 1st degree."

13. The trial in Case No. 84-C-14 was held on March 8, 1984, in the Municipal Court for East Liverpool. Plaintiff Leozie Pearson, Jr. was found guilty and sentenced to thirty (30) days in jail and fined Two Hundred and Fifty Dollars ($250). Both the jail term and fine were suspended. Costs were charged against Plaintiff Leozie Pearson, Jr.

14. On June 25, 1985, the Court of Appeals of Ohio for the Seventh District reversed the decision of the Municipal Court of East Liverpool in Case No. 84-C-14. A copy of that decision is

incorporated herein and attached as Exhibit "A."

15. Plaintiff Leozie Pearson, Jr. incurred legal expenses and costs of Six Thousand Forty-Seven Dollars and forty cents $6,047.40 in pursuing his defense to the charges in Case No. 84-C-14.

16. At the time of the initiation of the charge and/or Summons and Complaint in Case No. 84-C-14, or at a time prior to March 8, 1984, Defendant knew or should have known that Plaintiff Leozie Pearson, Jr. had not made any calls to the residence of Harrison Duck with the purpose to harass, abuse, or annoy any person.

17. At the time of the initiation of the charge and/or summons and complaint in Case No. 84-C-14, or at a time prior to March 8, 1984, Defendant knew or

should have known that Plaintiff Leozie Pearson, Jr. did not know between March, 1983, and September 16, 1983, that any calls were made from his residence to the residence of Harrison Duck.

18. At the time of the initiation of the charge and/or Summons and Complaint in Case No. 84-C-14, or at a time prior to March 8, 1984, Defendant knew or should have known that Plaintiff Leozie Pearson, Jr. had informed his son, Leozie Pearson III, that telephone calls were not to be made by his son to the Harrison Duck residence, regardless if such calls were welcome by Kelly Duck, and that Plaintiff Leozie Pearson, Jr. had strongly disciplined his son regarding these matters.

19. At the time of the initiation of the charge and/or Summons and Complaint

in Case No. 84-C-14, or at a time prior to March 8, 1984, Defendant knew or should have known that any calls made from Plaintiffs' residence to the residence of Harrison Duck were not for the purpose to abuse, threaten, annoy, or harass another person.

20. At the time of the initiation of the charge and/or Summons and Complaint in Case No. 84-C-14, or at a time prior to March 8, 1984, Defendant knew or should have known that telephone calls between the residence of Plaintiffs and the residence of Harrison Duck were being made by and to Plaintiff's son, Leozie Pearson III, by and to the daughter of Harrison Duck, Kelly Duck, and that such calls both to and from Leozie Pearson III and to and from Kelly Duck were not made

with a purpose to abuse, threaten, annoy or harass another person.

21. At the time of the initiation of the charge and/or Summons and Complaint in Case No. 84-C-14, or at a time prior to March 8, 1984, Defendants knew or should have known that any calls that were made by Leozie Pearson III to the Duck residence were made to Kelly Duck and were welcome and/or desired by Kelly Duck.

22. The charges in Case No. 84-C-14 were initiated and/or pursued by Defendant for a purpose of attempting to end an interracial friendship between Leozie Pearson III and Kelly Duck and because the Pearson family is of the black race.

23. Defendant knew or should have known that Kelly Duck was making calls to

the Plaintiffs' residence, including calls subsequent to the September 16, 1983, Complaint in Case No. 84-C-14 issued against Plaintiff.

24. The City of East Liverpool, by and through Taylor and Payne, knew that Kelly Duck was making calls to Plaintiffs' residence, as described in Paragraph Twenty (20), but refuse to process charges made by Plaintiffs against Harrison Duck, which were similar in nature to the charges filed against Plaintiff Leozie Pearson, Jr. in Case No. 84-C-14.

25. Despite the City of East Liverpool's failure and refusal to process charges against Harrison Duck, and at the initiation of Defendant Duck, the City of East Liverpool continued to pursue similar additional charges against

Leozie Pearson III, Plaintiffs' son, in September, 1984.

26. By the actions described above, Defendant interfered with Plaintiffs' contractual rights with the telephone company and individually and in conspiracy with the City of East Liverpool and its agents, deprived Plaintiffs, a black man and a black woman, to the same rights to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as enjoyed by white citizens, and to other rights protected by 42 U.S.C. Section 1981.

27. The actions of the Defendant constituted a pattern and practice of violating Plaintiffs' statutory and

constitutional rights as described herein.

28. Defendant knew, or reasonably should have known, that the actions complained of by Plaintiff herein constituted a violation and breach of rights secure to Plaintiff by the Fifth and Fourteen Amendments United States Constitution.

29. That the actions complained of by Plaintiff constituted a violation and breach of 42 U.S.C. Sections 1981.

30. As a result of these constitutional and statutory violations, Plaintiffs had been deprived of their right to fully enjoy their contractual rights with the telephone company and have suffered loss of income and expenses in pursuing Plaintiff Leozie Pearson, Jr.'s defense against Case No. 84-C-14.

Plaintiff Leozie Pearson, Jr. has suffered mental anguish, humiliation, stress, anxiety, embarrassment and, has been held up to ridicule within his community as a result of the constitutional and statutory violations committed by Defendant. Said Plaintiffs, accordingly, are entitled to an award of compensatory and punitive damages.

31. There is a real and actual controversy between Plaintiffs and Defendant as to whether Plaintiffs' constitutional and statutory rights have been violated by Defendants. Unless declaratory judgment is issued by this Court, uncertainty will continue to exist and that controversy will not be terminated.

WHEREFORE, Plaintiffs demand that the Court:

1. DECLARE, ADJUDGE, and DECREE, that Defendant's actions resulting in initiation and pursuit of criminal charges against Plaintiff in Case No. 84-C-14 was an attempt to and did deny Plaintiffs their rights to make and enforce their contract with the telephone company and was an attempt to and did cause Plaintiff Leozie Pearson, Jr. to be subject to unlike punishment, pains, penalties and exactions of every kind, because they and/or their son was black, in violation of the rights secured by 42 U.S.C. Section 1981, and by the Fifth and Fourteenth Amendments to the United States Constitution;

2. Grant Plaintiffs compensatory damages in the amount of One Hundred

Thousand Dollars ($100,000) with interest at the rate of ten percent (10%) per annum;

3. Grant Plaintiffs punitive damages in the amount of One Hundred Thousand Dollars ($100,000) with interest at the rate of ten percent (10%) per annum;

4. Grant Plaintiffs an award of reasonable attorneys fees and costs; and

5. Grant Plaintiffs such further relief as the Court deems just, proper and equitable.

SECOND CAUSE OF ACTION

32. Plaintiffs, for their Second Cause of Action incorporated herein by reference, as though fully rewritten, the allegations of the First Cause of Action and further state as follows:

33. This Court had pendent jurisdiction of the Second Cause of Action.

34. By the actions described above, Defendant has intentionally, tortiously, and maliciously interferred with the Plaintiffs' contractual relationship with the telephone company.

35. As a result of said interference, Plaintiffs have been deprived of their right to fully enjoy their contractual rights with the telephone company and have suffered loss of income and expenses in pursuing Plaintiff Leozie Pearson, Jr.'s defense against Case No. 84-C-14, and have further suffered mental anguish, humiliation, stress, anxiety, and embarrassment, and have been held up to ridicule within their community. Plaintiffs, accordingly, are entitled to

an award of compensatory and punitive damages.

WHEREFORE, Plaintiffs demand that the Court grant:

1. Grant Plaintiffs compensatory damages in the amount of One Hundred Thousand Dollars ($100,000) with interest at the rate of ten percent (10%) per annum;

2. Grant Plaintiffs punitive damages in the amount of One Hundred Thousand Dollars ($100,000) with interest at the rate of ten percent (10%) per annum;

3. Grant Plaintiffs an award of reasonable attorneys fees and costs; and

4. Grant Plaintiffs such further relief as the Court deems just, proper and equitable.

THIRD CAUSE OF ACTION

36. Plaintiff Carol Pearson, for her Third Cause of Action, incorporates by reference the allegations contained in the First and Second Causes of Action as though fully rewritten herein and further states as follows:

37. This Court has pendent jurisdiction of the Third Cause of Action.

38. As a direct and proximate result of the Defendant's actions described above, Plaintiff, Carol Pearson, has suffered the loss of the services of companionship, consortium and society of her husband, Leozie Pearson, Jr. and has incurred emotional distress, pain and suffering, and expenses for the defense of her husband against such allegations.

WHEREFORE, Plaintiff Carol Pearson demands that the Court grant judgment in favor of said Plaintiff and:

1. Grant Plaintiff compensatory damages in the amount of One Hundred Thousand Dollars ($100,000) with interest at the rate of ten percent (10%) per annum;

2. Grant Plaintiff punitive damages in the amount of One Hundred Thousand Dollars ($100,000) with interest at the rate of ten percent (10%) per annum;

3. Grant Plaintiff an award of reasonable attorney fees and costs; and

4. Grant Plaintiff such further relief as the Court deems just, proper and equitable.

FOURTH CAUSE OF ACTION

39. Plaintiff Carol Pearson for her Fourth Cause of Action incorporates by reference the allegations contained in here First, Second, and Third Causes of Action as though fully rewritten herein and further states as follows:

40. This Court has pendent jurisdiction of the Fourth Cause of Action.

41. As a direct and proximate result of the Defendant's actions described above, Plaintiff, Carol Pearson, has suffered the loss of the services of companionship, consortium and society of her son, Leozie Pearson, III, and has incurred emotional distress, pain and suffering, and expenses for the defense of her son against such allegations.

WHEREFORE, Plaintiff Carol Pearson demands that the Court grant judgment in favor of said Plaintiff and:

1. Grant Plaintiff compensatory damages in the amount of One Hundred Thousand Dollars ($100,000) with interest at the rate of ten percent (10%) per annum;

2. Grant Plaintiff punitive damages in the amount of One Hundred Thousand Dollars ($100,000) with interest at the rate of ten percent (10%) per annum;

3. Grant Plaintiff an award of reasonable attorney fees and costs; and

4. Grant Plaintiff such further relief as the Court deems just, proper and equitable.

GREEN, HAINES, SGAMBATI,
MURPHY & MACALA CO., L.P.A.

By Randall Vehar
RONALD G. MACALA and
RANDALL VEHAR
Attorneys for Plaintiffs
The Belden/Whipple Building
4150 Belden Village St.,
Suite 102
P.O. Box 35186
Canton, Ohio 44735
Telephone: (216) 493-1570
(38/4/2)

JURY DEMAND

The Plaintiffs in this action demand a trial by jury on all issues contained in this Complaint.

Randall Vehar
RANDALL VEHAR

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

LEOZIE PEARSON, JR. ET AL.	CASE NO. C87-1566Y
Plaintiffs	JUDGE DAVID D. DOWD, JR.
-vs-	DEFENDANT'S MOTION TO DISMISS
HARRISON DUCK	
Defendant	

NOW COMES Defendant, HARRISON DUCK, by and through his undersigned counsel, and pursuant to Fed. R. Civ. P. 12(B)(1) and (6), respectfully moves the Court for an order dismissing Plaintiffs' Complaint in its entirety for the following reasons:

1. Plaintiffs' claims predicated on 42 U.S.C. Section 1981 are barred by the applicable statute of limitations for pursuing such claims;

2. Assuming, arguendo, the action is not time-barred, Plaintiffs' claims

predicated on 42 U.S.C. Section 1981 are not actionable because the Complaint fails to allege Defendant has denied Plaintiffs the right to contract or any other benefits or rights guaranteed under such statute, or, in the alternative, because the Complaint fails to specifically allege that similarly situated individuals of the opposite race were treated any differently than Plaintiffs;

3. Plaintiffs' claims under the Fifth and Fourteenth Amendments of the United State Constitution fail to allege or exhibit the requisite state action necessary to state a claim thereunder;

4. Even assuming, arguendo, the requisite state action is somehow shown to exist, Plaintiffs cannot pursue an

independent constitutional cause of action under the Fourteenth Amendment;

5. Plaintiffs' claims under the Fifth and Fourteenth Amendments of the United States Constitution are, in any event, barred by the applicable statute of limitations.

WHEREFORE, Defendant respectfully requests that the instant Complaint be dismissed in its entirety. Attached hereto and made a part hereof is Defendant's Memorandum of Points and Authorities in Support of His Motion to Dismiss. Defendant also requests that the Court closely scrutinize his request to be granted recovery of all costs and attorneys' fees pursuant to Fed. R. Civ. P. 11, as the Complaint now before the Court is not, ". . . warranted by existing law or a good faith argument for

the extension, modification or reversal of existing law."

Respectfully submitted,

John E. Holcomb

John E. Holcomb
Keith L. Pryatel
MILLISOR & NOBIL
430 Quaker Square
Akron, Ohio 44308

Attorneys for Defendant,
Harrison Duck

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

LEOZIE PEARSON, JR. ET AL.	:	CASE NO. C87-1566Y
	:	JUDGE DAVID DOWD
Plaintiffs	:	
	:	SECOND AFFIDAVIT
-vs-	:	OF RANDALL VEHAR
	:	
HARRISON DUCK	:	
	:	
Defendant	:	

I, Randall Vehar, being first duly sworn deposes and says:

1. I am one of the attorneys representing the Plaintiffs in the above-captioned case.

2. I have reviewed Defendant's Rule 11 Motion to Recover His Expended Attorneys' Fees and Costs.

3. On August 18, 1987, I mail-served "Plaintiffs' First Set of Interrogatories, Requests for Production of Documents, and Request for Admissions."

A true and accurate copy of this document is attached hereto as Exhibit "A."

4. Before Defendant responded to Exhibit "A," this Court filed its Memorandum Opinion on September 21, 1987, dismissing the above-captioned case on statute of limitations grounds. This dismissal was subsequently vacated on September 24, 1987.

5. To date, Plaintiffs' counsel has not received any responses from Defendant to Exhibit "A." In part, Exhibit "A" was intended to seek discovery regarding the extent to which Defendant acted in concert with a state officer in an effort to (a) bring criminal charges against Plaintiff Leozie Pearson, Jr., and (b) discourage the same governmental officials from bringing a like action against Defendant despite similar

allegations against Defendant by Plaintiffs.

6. Since Defendant has not yet responded to Plaintiffs' discovery requests, Plaintiffs are not fully able to justify their opposition to Defendant's Rule 11 requests.

7. I am over the age of eighteen years.

Randall Vehar
RANDALL VEHAR

SWORN TO before me and SUBSCRIBED in my presence, this 26th day of October, 1987.

Lori A. Baker
NOTARY PUBLIC

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

LEOZIE PEARSON, JR. ET AL.	:	CASE NO. C87-1566Y
Plaintiffs	:	PLAINTIFFS' FIRST SET OF INTERROGATORIES, REQUEST FOR PRODUCTION OF DOCUMENTS, AND REQUEST FOR ADMISSIONS
-vs-	:	
HARRISON DUCK	:	
Defendant	:	

Plaintiff's, by and through their counsel, hereby request that Defendant, Harrison Duck, respond under oath with Rules 33, 34 and 36 of the Federal Rules of Civil Procedure to the following Interrogatories, Requests for Production of Documents, and Request for Admissions. These discovery requests shall be deemed to be continuing, so as to require Defendant seasonably to supplement or amend his answers in accordance with Rule 26 of the Federal Rules of Civil Procedure.

(Exhibit A to 2nd Affidavit)

PLEASE TAKE NOTICE that copies of Defendant's answers and responses must be served upon the undersigned within thirty (30) days after the service of this discovery request. It is requested that the documents sought herein be produced on September 21, 1987, at 10:00 a.m. at the following address: GREEN, HAINES, SGAMBATI, MURPHY & MACALA CO., L.P.A., 4150 Belden Village Street, The Belden/Whipple Building, Suite 102, Canton, Ohio 44735, or my mailing copies of said documents to said address by September 19, 1987.

Counsel for Plaintiffs will entertain reasonable requests for modifying the time, place and manner of producing such documents. Such requests should be directed to Plaintiff's counsel, Randall Vehar, at (216) 493-1570.

DEFINITIONS AND INSTRUCTIONS

A. The term "document" means without limitation the original (or, when the original is not in your possession, custody or control, an identical copy) and any non-identical copy (whether different from the original because of notes made on or attachments to such copy or otherwise) of all writings, drawings, graphs, charts, photographs, tapes, data processing, records, discs, phono records and other data compulations from which information can be obtained; all correspondence, telegrams and other written communications; all contracts, agreements, order tickets, confirmations, invoices, receipts, adding machine tapes, calculations, ledgers, journals and books of account; all notes, memoranda, analyses, reports, studies, forecasts,

work papers and minutes of meetings; all book, pamphlets, newspaper and periodical articles and clippings, lists, manuals, guides and tables; and all other written, printed, typed, recorded, or graphic material of any nature whatsoever, whether or not in the possession, custody or control of the Defendant(s).

B. When an Interrogatory asks for the description or identification of a document, the answer shall state the following information with respect to each document:

1. The title, heading, or caption of such document, if any;

2. The identifying number(s), letter(s) or combination thereof, if any, and the significance or meaning of such number(s), letter(s), or combination thereof;

3. The date appearing on such document and if no date appears thereon, the answer shall so state

and give the date or approximate date on which such document was prepared;

4. The general nature and description of such document (i.e., whether it is a letter, memorandum, minutes of a meeting, etc.), and the number of pages of which it consists;

5. The name of the person who signed such document and if it was not signed, the answer shall so state (in any event) and shall give the name of the person or persons who prepared it;

6. The name of the person for whom the document was prepared and to whom such document was addressed and the name of each person, other than said addressee, to whom such document a copy thereof was sent; and

7. The name of the person who has custody of such document.

The foregoing information shall be given in sufficient detail to enable the person or persons to whom a subpoena is directed to identify fully the document sought to be produced and to enable Plaintiff(s) to determine that such

document, when produced, is in fact the document so described.

C. In identifying a "document," identify the original, any copies of the document, including copies with notations or other marks not on the original, and identify any and all drafts of the document. If any document was, but no longer is, in your possession, custody or control, state what disposition (including without limitation any destruction or alteration, in whole or in part) was made of it, the reason for such disposition and the date thereof. Documents to be identified shall include documents with respect to which a privilege is or may be claimed.

D. The term "person" means any natural person (living or dead), corporation, company, partnership,

association, proprietorship, organization, government unit, group or other entity.

E. "Identify" or "state the identity" means:

1. With respect to a natural person, state his or her full name, present or last known residence address and business address (including street name and number, city of town, state, zip code, and telephone number), business affiliation, title or position during the period of time referred to (explicitly or implicitly) in the Interrogatory and present or past relationship, if any, to the Defendant(s), or to the Plaintiff(s). If to your general knowledge, information or belief, such person is no longer living or is in a physical condition that he or she is or may soon become unable to give deposition testimony, separately so state with respect to each such person;

2. With respect to any entity other than a document or natural person, state its full name and the type of entity (e.g., corporation, partnership, labor union, trade association, government agency) and the address of its principle

place of business (including street name and number, city or town, state, zip code, and telephone number). In addition, in the case of a business organization other than a publicly held corporation, identify each owner and each officer thereof.

3. With respect to a meeting or an oral communication, state the date, place and time at which it occurred, identify the speaker and each other person who was present or heard or observed it, state its substance, and identify each document that refers or relates to it;

4. With respect to an event or occurrence other than a meeting or oral communication, state the substance, date, duration, and location of such event or occurrence and identify each person attending, witnessing or participating in such event or occurrence;

5. With respect to a place or location, state the address, including the street name and number (or, if there is no such street and number, the name of the streets of the nearest intersection), city or town, state and zip code.

F. When an Interrogatory asks for the identity of the "source" of a

contention, belief, information or knowledge, the answer should (1) identify each document or oral communication and describe all other information or events, which evidence, contain, or form in whole or in part the basis for the contention, belief, information or knowledge; (2) state the date on which and circumstances under which the Defendant(s) learned thereof; and (3) describe the exact portion of the text of any such document (either quoted or identified by page(s) and line(s)).

G. The term "and" as well as "or" shall be construed either disjunctively or conjunctively as necessary to bring within the scope of these interrogatories any information which might otherwise be construed to be outside their scope.

H. If the information requested in an Interrogatory is not available or is unknown, state the efforts that were made to obtain the information and, if known, the source from which the information may be obtained.

I. If any privilege is claimed as any information called for, or any document required to be identified, by an interrogatory, or produced, state the nature of the privilege claimed (e.g., attorney-client, work product, etc.) and the basis for claiming the privilege as to each specific item of information or document. In addition, with respect to any document as to which the privilege is claimed, state the type of document and the date of such document, identifying each person who prepared it, each person (if any) who signed it, each person to

whom it was directed, circulated or distributed, each person who has seen, reviewed, and/or read the document, and each person now in possession of the document or any identical or non-identical copy thereof.

INTERROGATORIES

INTERROGATORY NO. 1:

Indentify each address and telephone number at which Kelly Duck has resided during the past year and each address or telephone number at which Kelly Duck is expected to reside during the remainder of 1987. Such identification shall be consistent with "Definitions and Instructions" set forth above and in a sufficient detail, so that Plaintiffs may

be able to subpoena for deposition such person.

ANSWER:

INTERROGATORY NO. 2:

Set forth all actions taken by Defendant in an effort to obtain the assistance of or action by the State of Ohio, the City of East Liverpool, or any agent thereof, or any agent of a governmental entity, to (a) institute and continue criminal proceedings against Plaintiff Leozie Pearson, Jr. related to the use of the telephone located within the residence of Leozie Pearson, Jr., and (b) cause a cessation of communications, if any, by, to, or between Kelly Duck and Leozie Pearson, III. In answering this

Interrogatory, set forth the dates of the action taken, describe the action taken, and identify any and all persons, who were participants in or witnesses to such actions and conversations, and the governmental position, if any, held by such person(s) at the time.

ANSWER:

INTERROGATORY NO. 3:

If Defendant refuses to admit to or denies any part of the admission requests set forth below, set forth all facts relied on in refusing to admit or deny each such admission request.

ANSWER:

PRODUCTION OF DOCUMENTS

1. Produce all documents identified in the responses to the above Interrogatories.

2. Produce all documents utilized in the preparation of the answers and responses to the above Interrogatories.

3. Produce any and all documents that refer to matters at issue in State of Ohio v. Leozie Pearson, Case No. 84-C-14 (Municipal Court of East Liverpool, Ohio).

4. Produce any and all documents that will show or will tend to show telephone calls made between the residence of Plaintiffs and the residence

of Defendant, regardless of who initiated such calls, or regardless from which residence such calls were initiated.

5. Produce any notes, memoranda, or other documents that would reflect in any way any conversations between Plaintiffs and Defendant, regarding efforts to discourage or terminate the relationship, if any, between Plaintiffs' son and Defendant's daughter.

REQUEST FOR ADMISSIONS

Plaintiffs request that Defendant admit to the following:

1. Leozie Pearson, Jr., Carol Pearson, and Leozie Pearson, III, are members of the black race.

2. Harrison Duck and Kelly Duck are members of the white race.

3. Sometime prior to September 16, 1983, Defendant filed a charge and/or complaint with the East Liverpool City Law Director and/or the City Solicitor alleging that Leozie Pearson, Jr., was responsible for harassing phone calls from Leozie Pearson, Jr.'s residence to Harrison Duck's residence. Thereafter, Harrison Duck continued to encourage the Law Director and/or and City Solicitor to pursue criminal charges against Leozie Pearson, Jr., based on alleged telephone calls from the residence of Leozie Pearson, Jr., to the residence of Harrison Duck.

4. Between the time that Harrison Duck initiated the proceedings leading to the criminal action against Leozie Pearson, Jr., in Case No. 84-C-14 (Municipal Court of East Liverpool, Ohio), until said case was dismissed on appeal, Harrison Duck knew that (a) Leozie Pearson, Jr., was not making telephone calls to Kelly Duck and/or to the residence of Harrison Duck, and (b) that Leozie Pearson, Jr., was not making such calls for the purpose to abuse, threaten, annoy, or harass another person.

5. Between the time that Harrison Duck initiated the proceedings leading to the criminal action against Leozie Pearson, Jr., in Case No. 84-C-14 (Municipal Court of East Liverpool,

Ohio), until said case was dismissed on appeal, Harrison Duck knew that Leozie Pearson, Jr., did not knowingly make or cause to be made telephone calls and did not knowingly permit telephone calls to be made from a telephone under his control to another; and Harrison Duck knew that Leozie Pearson, Jr., had not failed to identify himself to the recepient of telephone calls; and Harrison Duck knew that Leozie Pearson, Jr., had not made a telephone call to the residence of Harrison Duck, or permit such a telephone call, with the purpose to harass, abuse or annoy any person at the premise to which the telephone call was made, whether or not conversation took place during the telephone call.

6. During the pendancy of the criminal action in Case No. 84-C-14 against Leozie Pearson, Jr., Harrison Duck knew that (a) his daughter, Kelly Duck, was initating telephone calls to the residence of Leozie Pearson, Jr., and (b) that his daughter, Kelly Duck, desired telephone calls from Leozie Pearson, III.

7. During the pendancy of the criminal action in Case No. 84-C-14, Harrison Duck attempted to discourage and did discourage the City Law Director and/or the City Solicitor of East Liverpool, Ohio, from pursuing charges filed by Leozie Pearson, Jr., or any of his immediate family, against Harrison Duck, or his immediate family, alleging violations of Section 2917.21 of the Ohio

Revised Code, based upon telephone calls made by Kelly Clark to the residence of Leozie Pearson, Jr.

8. The charges in Case No. 84-C-14 were initiated and/or pursued by Harrison Duck in an attempt to end the relationship between Leozie Pearson, III, and Kelly Duck.

9. Harrison Duck has not taken any legal action against any white male, or the family of any white male, who has desired a relationship and/or friendship with Kelly Duck, nor has Harrison Duck sought to have any governmental entity take legal action against such person(s).

In responding to the above requests for admissions, Defenant shall fairly meet the substance of the requested admission, and when good faith requires that Defendant qualify and answer or deny only a part of the matter of which an admission is requested, the Defendant shall specify so much of it as is true and qualify or deny the remainder. Defendant may not give lack of information or knowlege as a reason for failure to admit or deny, unless the Defendant states that the Defendant has made reasonable inquiry and that the information known or readily obtainable by Defendant is insufficient to enable the Defendant to admit or deny.

Respectfully submitted,

GREEN, HAINES, SGAMBATI,
MURPHY & MACALA CO., L.P.A.

By Randall Vehar

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RANDALL VEHAR
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(38/4/3)

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Plaintiff's First Set of Interrogatories, Request for Production of Documents, and Request for Admissions was forwarded by regular U.S. mail, postage prepaid, to John E. Holcomb and KeithL. Pryatel, MILLISOR & NOBIL, 430 Quaker Square, Akron, Ohio 44308, Attorneys for Harrison Duck, on this 18th day of August, 1987.

Randall Vehar
RANDALL VEHAR
Attorney for Plaintiff

DCWD, J.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

LEOZIE PEARSON, JR. ET AL.,	:	CASE NO. C87-1566Y
Plaintiffs,	:	MEMORANDUM OPINION
-vs-	:	
HARRISON DUCK,	:	
Defendant.	:	

On June 23, 1987, the plaintiffs' filed a complaint alleging that the defendant, Harrison Duck, violated their rights as established under 42 U.S.C. Section 1981. The Plaintiffs also alleged three related state claims in their complaint. The defendant is before the Court on a motion to dismiss. For the reasons that appear below, the motion to dismiss is well taken.

On September 16, 1983, the defendant filed a criminal charge and complaint with the East Liverpool Police Department alleging that plaintiff, Leozie Pearson, Jr., was in violation of Ohio Rev. Code Section 2917.21(A)(1). Under Section 2917.21(A)(1), it is a misdemeanor in the first degree to

> knowingly make or cause to be made a telephone call, or knowingly permit a telephone call to be made from a telephone under his control, to another, if the caller ... [f]ails to identify himself to the recipient of the telephone call and makes the telephone call with purpose to harass, abuse, or annoy any person at the premises to which the telephone call is made, whether or not conversation takes place during the telephone call.

Defendant's complaint against the plaintiff was based upon the plaintiff's, Leozie Pearson, Jr., failure to control and prevent unwelcome telephone calls by

the plaintiffs' son to the defendant's daughter. On March 8, 1984, a trial without a jury was held and the plaintiff, Leozie Pearson, Jr., was found guilty of the charge and sentenced to thirty days in jail and fined $250.00. The jail term and fine were suspended by the municipal court. The Court of Appeals of Columbiana County, Ohio reversed the plaintiff's conviction after finding that plaintiff had not been tried within the statutory time established for trial under Ohio Rev. Code Section 2945.71(B)(2).

On June 23, 1987, the plaintiffs filed this action alleging that plaintiffs' rights as secured under 42 U.S.C. Section 1981 were violated as a result of the defendant's institution of the criminal misdemeanor charge. The

plaintiffs further alleged that the defendant, as a result of the same action, caused tortious interference with their contractual relationship with the telephone company and loss of consortium on behalf of plaintiff, Carol Pearson, for the harm caused to Leozie Pearson, Jr. and plaintiffs' son. The complaint alleges that this Court has jurisdiction over the first cause of action under 42 U.S.C. Section 1981 and pendent jurisdiction over three state causes of action.

The defendant argued that the first cause of action under 42 U.S.C. Section 1981 is time barred and is not within the one-year statute of limitation period for 42 U.S.C. Section 1981 actions. The defendant further argues that without jurisdiction over the first cause of

action, this Court cannot exercise jurisdiction over the three remaining state claims. The defendant's arguments are persuasive and withstand plaintiffs' counter-arguments.

In Demery v. City of Youngstown, 818 F.2d 1257 (6th Cir. 1987), the Sixth Circuit Court of Appeals held that "the statute of limitations to be applied to Section 1981 actions is the statute of limitations that applies to tort actions in each state." 818 F.2d at 1261. Further, the Court held that

> [h]aving previously determined that Wilson v. Garcia has retroactive effect and that the one year statute of limitations of Ohio Revised Code Section 2305.11 is the appropriate statute of limitations for Section 1983 actions, Mulligan v. Hazard, ...this Court resolves that the same limitation period is equally and retroactively applicable to Section 1981 suits.

818 F.2d at 1261. The defendant argues

that there are three possible dates from which the statute of limitations can be computed: (1) September 16, 1983, the date the criminal complaint was filed; (2) March 8, 1984, the date of plaintiff's criminal trial and adjudication; and (3) June 25, 1985, the date the Ohio Court of Appeals reversed plaintiff's misdemeanor conviction. It is clear that the complaint was filed substantially beyond the one-year period under any of the above-mentioned dates. Accordingly, the complaint is time-barred as not within the one-year statutory limitation period.

The plaintiffs rely on two primary arguments in opposition to the application of the one-year statute of limitations to this action. First, the plaintiff contends that the Sixth Circuit erred in not applying the Chevron Oil Co. v. Gainsted

Huson, 404 U.S. 97 (1971), three-part test for prospective application rather than retroactive application. Second, the plaintiff argues that, assuming the one-year statute of limitations is correct, a federal court is required to look to state law and consider state tolling provisions and applicable exceptions to state statute of limitations.

The plaintiffs Chevron prospective application argument is misplaced under Demery's clear holding that the statute of limitation period for Section 1981 actions is retroactive. The basis for the Demery retroactivity determination, according to the Sixth Circuit, is found in Mulligan v. Hazard, 777 F.2d 340 (6th Cir. 1985). In Mulligan, the Sixth Circuit recognized that Wilson v. Garcia, 471 U.S. 261 (1985), requires retroactive application of Section

1983 one-year statute of limitations and that that same retroactive application would apply in the Sixth Circuit. The Demery holding and its reliance on the Mulligan analysis indicates that the Sixth Circuit considered the retroactive versus the prospective application of the one-year statute of limitations in Section 1981 actions, and therefore the plaintiffs' first argument is not well taken.

The plaintiffs next contend that this Court must apply any exceptions and tolling provisions to the one-year statute of limitations under Ohio law and rely on pre-Wilson v. Garcia case law. E.g., Board of Regents v. Tomanio, 446 U.S. 478 (1980); Johnson v. Railway Express Agency, Inc., 421 U.S. 454 (1975); Jones v. Shankland, 800 F.2d 77 (6th Cir. 1986). The plaintiffs argue that prior to Demery, a

Section 1981 action was characterized as an action which created liability by statute and was thus within Ohio Rev. Code Section 2305.07. The period of limitations under Section 2305.07 is six years. The plaintiff further argues that under the pre-Demery six-year limitation, the present action is within the limitation period. The plaintiffs then rely on state court decisions in support of the proposition that when a cause of action accrues the claimant has a vested right in that cause and that right cannot be extinguished by retroactive application of a statute of limitations unless a reasonable opportunity is provided for the claimant to assert that cause of action. E.g., Adams v. Sherk, 4 Ohio St. 3d 37 (1983); Cook v. Matevejs, 56 Ohio St. 2d 234 (1978); Gregory v. Flowers, 32 Ohio St. 2d 48 (1972). Since Demery, in

effect, changed the statute of limitations from six years to one year, the plaintiffs argue that under Ohio law when a change in statute of limitations occurs a plaintiff must be given a reasonable opportunity to present his claim despite the non-compliance with the new statute of limitations. Therefore, according to the plaintiffs, their complaint was filed within a reasonable amount of time after the change in the statute of limitations and is not time barred.

Despite the plaintiffs' reasoned theory, this Court finds the Sixth Circuit's position on this issue to be unquestionably clear in Demery. Simply stated and without more, the one-year statute of limitations in Section 1981 actions is retroactively applied. Demery v. City of Youngstown, 818 F.2d 1257 (6th

Cir. 1987). Therefore, in view of Demery, this Court is bound to follow the Sixth Circuit mandate.

Having determined that the one-year statute of limitations period applies to this action and having determined that the plaintiffs have failed to adequately rebut the application of the statute of limitations, this Court finds that the first cause of action under 42 U.S.C. Section 1981 is time barred according to Demery v. City of Youngstown, 818 F.2d 1257 (6th Cir. 1987). Accordingly, defendant's motion to dismiss is granted as to the first cause of action.

Having found that the first cause of action is dismissed, this Court declines to exercise pendent jurisdiction over the three remaining state causes of action.

United Mine Workers v. Gibbs, 383 U.S. 715 (1966).

The Court does not consider the defendant's summary request for Rule 11 sanctions, incorporated within the body of the motion to dismiss and memorandum in support of the motion to dismiss, as a "motion" properly before the Court and was therefore not considered.

IT IS SO ORDERED.

David D. Dowd, Jr.
David D. Dowd, Jr.
U. S. District Judge

DOWD, J.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Leozie Pearson, Jr., et al.	:	CASE NO. C87-1566Y
Plaintiffs,	:	JUDGMENT ENTRY
vs.	:	
Harrison Duck	:	
Defendant.	:	

For the reasons set forth in the Memorandum Opinion filed contemporaneously with this Judgment Entry, IT IS HEREBY ORDERED, ADJUDGED and DECREED that the above-captioned case is dismissed.

David D. Dowd, Jr.
David D. Dowd, Jr.
U. S. District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

LEOZIE PEARSON, JR. ET AL.	:	CASE NO. C87-1566Y
Plaintiffs	:	
-vs-	:	O R D E R
HARRISON DUCK	:	
Defendant	:	

The Court hereby vacates its Judgment Entry of September 21, 1987 entered in the above-captioned case. The Court has been informed by counsel for the defense that the Sixth Circuit Court of Appeals has recently reheard arguments on the case of Demery v. City of Youngstown, 818 F.2d 1257 (6th Cir. 1987), reh'g granted (Aug. 19, 1987) (LEXIS, Gen. Fed. Library, U.S.App. file). On rehearing, the Sixth Circuit Court of Appeals reconsidered the issue of whether the

one-year statute of limitations period would be applied to Section 1981 actions retroactively. Although the parties and the Court have spent a substantial amount of effort on briefing and resolving the issues of retroactivity in this case, in light of the Court's reliance on Demery's first decision, this Court orders the parties to file simultaneous briefs by October 12, 1987 and address the issue of what effect the Sixth Circuit's recent decision has on this case.

The defendant's motion to dismiss will be held in abeyance pending the Court's review and consideration of the parties' briefs.

IT IS SO ORDERD.

David D. Dowd, Jr.
U. S. District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

LEOZIE PEARSON, JR. ET AL.	:	CASE NO. C87-1566Y
Plaintiffs	:	MEMORANDUM OPINION
-vs-	:	
HARRISON DUCK	:	
Defendant	:	

INTRODUCTION

On June 23, 1987, the plaintiffs filed a complaint alleging that the defendant Harrison Duck, violated their rights as established under 42 U.S.C. Section 1981. On September 21, 1987, this Court entered a Memorandum Opinion and Judgment Entry dismissing the plaintiffs' Section 1981 claim as time barred under Demery v. City of Youngstown, 818 F.2d 1257 (6th Cir. 1987). Thereafter, on September 24, 1987, the Court vacated its previous

order on the basis that the Sixth Circuit Court of Appeals had reheard and reversed itself on the issue of retroactivity in Demery. The Court ordered the parties to submit briefs on the effect of that decision in this case. The parties have supplied the Court with the briefs and the Court is now in a position to again address the defendant's motion to dismiss. For the reasons that appear below, the motion to dismiss is well taken.

II. DISCUSSION

The facts of the case arise out of the defendant's institution of a criminal charge against the plaintiff. On September 16, 1983, the defendant filed a criminal charge and complaint with the East Liverpool Police Department alleging

that plaintiff, Leozie Pearson, Jr., was in violation of Ohio Revised Code Section 2917.21(A)(1). Under Section 2917.21(A)(1), it is a misdemeanor in the first degree to

> knowingly make or cause to be made a telephone call, or knowingly permit a telephone call to be made from a telephone under his control, to another, if the caller ... [f]ails to identify himself to the recipient of the telephone call and makes the telephone call with purpose to harass, abuse, or annoy any person at the premises to which the telephone call is made, whether or not conversation takes place during the telephone call.

Defendant's complaint against the plaintiff was based upon the plaintiff's, Leozie Pearson, Jr., failure to control and prevent unwelcome telephone calls by the plaintiffs' son to the defendant's daughter. On March 8, 1984, a trial without a jury was held and the

plaintiff, Leozie Pearson, Jr., was found guilty of the charge and sentenced to thirty days in jail and fined $250.00. The jail term and fine were suspended by the municipal court. The Court of Appeals of Columbiana County, Ohio reversed the plaintiff's conviction after finding that plaintiff had not been tried within the statutory time established for trial under Ohio Rev. Code Section 2945.71(B)(2).

On June 23, 1987, the plaintiffs filed this action alleging that plaintiffs' rights as secured under 42 U.S.C. Section 1981 were violated as a result of the defendant's institution of the criminal misdemeanor charge. The plaintiffs further alleged that the defendant, as a result of the same action, caused tortious interference with

their contractual relationship with the telephone company and loss of consortium on behalf of plaintiff, Carol Pearson, for the harm caused to Leozie Pearson, Jr. and plaintiffs' son. The complaint alleges that this Court has jurisdiction over the first cause of action under 42 U.S.C. Section 1981 and pendent jurisdiction over three related state claims.

In his motion to dismiss, the defendant argued that the first cause of action under 42 U.S.C. Section 1981 is time barred and is not within the one-year statute of limitation period for 42 U.S.C. Section 1981 actions. The defendant further argued that without jurisdiction over the first cause of action, this Court cannot exercise

jurisdiction over the three remaining state claims.

In Demery v. City of Youngstown, 818 F.2d 1257 (6th Cir. 1987), the Sixth Circuit Court of Appeals held that "the statute of limitations to be applied to Section 1981 actions is the statute of limitations that applies to tort actions in each state." 818 F.2d at 1261. Further, the Court held that

> [h]aving previously determined that Wilson v. Garcia has retroactive effect and that the one year statute of limitations of Ohio Revised Code Section 2305.11 is the appropriate statute of limitations for Section 1983 actions, Mulligan v. Hazard, ...this Court resolves that the same limitation period is equally and retroactively applicable to Section 1981 suits.

818 F.2d at 1261. On August 19, 1987, however, the Sixth Circuit Court of Appeals issued an opinion on rehearing on Demery. On rehearing, the Court addressed the issue

of retroactive application of the limitation period to Demery's complaint. The Court relied on St. Francis College v. Al-Khazraji, ___ U.S. ___, 107 S. Ct. 2022 (1987), where the Supreme Court affirmed the Third Circuit's refusal to apply Pennsylvania's personal injury statute of limitations to Section 1981 actions retroactively. The Sixth Circuit explained that the Supreme Court affirmed the Third Circuit's decision not to apply the statute of limitations period retroactively on the basis that the Third Circuit "had previously applied Pennsylvania's six-year statute of limitations in Section 1981 actions, [and] that the decision in Goodman overruled its prior holding by applying a shorter statute of limitations, and that the plaintiff was entitled to rely upon the prior decision applying the longer

limitations." Demery, 818 F.2d at 1264. The Sixth Circuit went on to state that the Sixth Circuit "had previously held that Ohio's six-year statute of limitations, Ohio Revised Code Section 2305.07, applied in Section 1981 employment discriminations." Id. (citing Mason v. Owens-Illinois, Inc., 517 F.2d 520 (6th Cir. 1975)). The Court found that Demery had relied upon Mason in filing the action approximately three years after his discharge from employment. The Sixth Circuit concluded "that in circumstances where this decision would mandate that application of a shorter limitations period than had previously been applied in Section 1981 actions, it should not be applied retroactively." Id. Thus the rehearing opinion reversed Demery's earlier holding

of retroactive application of the limitations period.

Two questions arise after the rehearing decision in Demery in analyzing whether Demery should be given retroactive application in a particular case. First, the Court in Demery found that Demery had reasonably relied upon Mason in filing his action three years after his discharge and within the six year statutory period established by Mason. However, the Court made no indication of how such finding was established. The Court did not cite to any district court finding of that fact, and thus it is unclear as to how the determination was made. Second, the Court concludes that "in circumstances" where the limitation period is changed to a shorter period, then Demery should not be applied retroactively. The question becomes then

what are the circumstances that dictate the decision whether to apply Demery retroactively. Fortunately, the Court has addressed this similar issue in the context of the retroactive application of Section 1983 actions.

In Thomas v. Shipka, 829 F.2d 570 (6th Cir. 1987), the Sixth Circuit Court of Appeals reexamined the retroactive application of the one-year statute of limitations period for Section 1983 actions in Ohio in light of the Supreme Court's decision in St. Francis College v. Al-Khazraji, ___ U.S. ___, 107 S. Ct. 2022 (1987). The court recognized that the general rule in federal cases is that the cases should be decided in accordance with the law existing at the time of the decision. Thomas, 829 F.2d at 573. In Chevron v. Huson, 404 U.S. 97 (1971), the

Court "cautioned against the retroactive application of decisions adopting a new statute of limitations...." Id. Chevron establishes three factors to be considered when making a determination of whether a change in the statute of limitations should be applied retroactively. Generally, the three factors include: (1) whether the decision to be applied retroactively has established a new principle of law, "either by overruling clear past precedent on which litigants may have relied, . . . or by deciding an issue of first impression whose resolution was not clearly foreshadowed;" (2) whether the application of the decision would further the operation of the new law and its goals; and (3) the balance of the inequities imposed by the retroactive application. Chevron, 404 U.S. at 106-107. Although the Court considered all three

factors, the Court concluded that the primary factor under the Chevron analysis is whether the decision to be applied retroactively has overruled clear precedent. In Thomas, the Sixth Circuit analyzed the factors under Chevron in relationship to the one-year limitation applications in Section 1983 actions and concluded that "the crucial inquiry . . . focuses on whether at the time [the] plaintiff filed her case, there was a clear precedent upon which she could have justifiably relied establishing a definite limitations period for the type of claim brought by the pliantiff...." Thomas, 829 F.2d at 574. Therefore, the focus of the analysis of whether to apply the one-year statute of limitations in Section 1983 actions and Section 1981 actions is on state of the law at the time of the

complaint. If, at the time of the complaint, there was a clear limitations precedent for the type of claim brought by the plaintiff and the decision to be applied shortens that period, retroactive application is not appropriate. Thomas, 829 F.2d at 574; Demery, 818 F.2d at 1264. However, if no clear precedent was established for the type of claim brought by the plaintiff at the time of his complaint, retroactive application is permitted.

In Thomas, the Court permitted the retroactive application of Mulligan in a Section 1983 action because between the time that the plaintiff's alleged injury arose and the time that he filed his complaint, there was no clear precedent on which he could rely and thus the decision in Mulligan would be given its

presumptively retroactive application. Similarly, in Vodila v. Clelland, slip op. (6th Cir. Dec. 28, 1987), the Sixth Circuit Court of Appeals relied on the analysis in Thomas, and applied Mulligan retroactively to a Section 1983 action because between the time of the plaintiff's discharge and the bringing of his action, there was no clear precedent in the Sixth Circuit for him to rely on any limitations period. Both Thomas and Vodila can be contrasted to Demery in that at the time of Demery's complaint, the Sixth Circuit held that there was a clear precedent, i.e., a six-year limitation period established by Mason, and thus the application of Demery would overrule clear precedent which the plaintiff had relied upon. In that circumstance, retroactive application is inappropriate.

In the motion to dismiss, the defendant argues that there are three possible dates from which the statute of limitations can be computed: (1) September 16, 1983, the date the criminal complaint was filed; (2) March 8, 1984, the date of plaintiff's criminal trial and adjudication; and (3) June 25, 1985, the date the Ohio Court of Appeals reversed plaintiff's misdemeanor conviction. In the Court's Memorandum Opinion of September 21, 1987, the Court held that under any of the three dates the complaint was filed beyond the one-year period under any of the above-mentioned dates.

The first Demery decision was rendered on May 12, 1987. The plaintiff in the present case filed suit just shortly thereafter, on June 23, 1987. In the Court's view, it is immaterial whether the

complaint was filed just before or just after the first Demery decision. Since the focus of the inquiry is reasonable reliance, it would certainly be inequitable and illogical to hold that a Section 1981 plaintiff who filed suit on May 11, 1987 was entitled to rely on Mason but that a plaintiff who filed suit on May 13, 1987 was not so entitled.

The Court therefore finds that under the Sixth Circuit's reconsideration of the retroactivity issue in Demery, the plaintiffs' Section 1981 cause of action is not time barred. The Court finds that the plaintiffs could have reasonably relied upon the six-year limitation period in Mason and thus the application of Demery would shorten the limitation period for the plaintiffs. Accordingly, the Court will

not apply Demery retroactively to this action.

The defendant strenuously argues that prior to Demery, the state of the law regarding the limitations period for Section 1981 actions was in a state of flux and that there was no clear holding that Section 1981 actions were subject to a six-year limitations period. Moreover, the defendant argues that the decision in Wilson v. Garcia, 471 U.S. 261 (1985) and the Third Circuit decision in Goodman v. Lukens Steel Co., 777 F.2d 113 (3d Cir. 1985), aff'd 107 S. Ct. (1987), gave notice to the plaintiffs that Section 1981 actions would be viewed under the personal injury statutes as were the Section 1983 actions. The Court, however, finds that in Demery the court specifically stated that Mason was a clear indication of the Section 1981

limitation period and that the plaintiffs could reasonably have relied on the holding in Mason and the six-year limitation period. In sum, the Court finds that the application of Demery would shorten the limitations period previously relied upon by the plaintiffs and the rehearing opinion of Demery requires that such retroactive application not be applied in this circumstance.

Notwithstanding the timeliness of the plaintiffs' cause of action under Section 1981, the Court finds that the defendant's motion to dismiss is well taken on the basis that the plaintiffs have failed to state a cause of action under Section 1981. The plaintiffs claim that as a result of the defendant's action, the "Defendant interfered with Plaintiff's contractual rights with the telephone company...."

Complaint Para. 26. Further, the plaintiffs claim that the defendant engaged in a conspiracy with the City of East Liverpool

> deprived Plaintiffs, a black man and a black woman, to the same rights to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and properties as enjoyed by white citizens, and to other rights protected by 42 U.S.C. Section 1981.

Id. The plaintiffs further allege that "[a]s a result of these constitutional and statutory violations, Plaintiffs have been deprived of their right to fully enjoy their contractual rights with the telephone company...." Complaint para. 30.

The Court finds that the plaintiffs have failed to state a claim that the defendant has denied the plaintiffs of

the right to make and enforce contracts with the telephone company. Section 1981 provides that

> [a]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C.A. Section 1981. There is no allegation that the plaintiffs have been interfered with in their contractual relationship between the telephone company and the plaintiffs. There is no indication that the plaintiffs' telephone service was disrupted or discontinued as a result of his criminal charge. Further, there has been no allegation that the telephone company or the

defendant has refused to contract with the plaintiff on the basis of his race. In sum, the Court finds that the plaintiffs have failed to state a claim under Section 1981.

The plaintiffs also made a number of claims in their complaint regarding the deprivation of rights under the fifth and fourteenth amendments to the United States Constitution. Complaint Para. 28. The defendant argued that the plaintiffs failed to state a cause of action under the fifth and fourteenth amendments on the basis that no independent action is recognized under those amendments. Upon review of the complaint, the Court finds that the plaintiffs claim under the first, fifth and fourteenth amendments of the United States Constitution are included within the Section 1981 claims

and do not constitute a separate cause of action.

Having found that the first cause of action is dismissed, this Court declines to exercise pendent jurisdiction over the three remaining state causes of action. United Mine Workers v. Gibbs, 383 U.S. 715 (1986).

III. DEFENDANT'S RULE 11 MOTION.

Before the Court is also the defendant's Rule 11 motion to recover his expended fees and costs as a result of defending the asserted constitutional causes of action under the first, fifth and fourteenth amendments to the United States Constitution in addition to the civil rights action under 42 U.S.C. Section 1981. The defendant argues that by asserting those claims, plaintiffs'

counsel failed to certify that those claims and positions asserted therein were well grounded in fact or law. The plaintiffs have opposed the motion and have asserted that upon completion of discovery the plaintiffs may well have a claim of state action on the part of the defendant. Accordingly, the plaintiffs assert that the purported constitutional claims were based in fact and law.

The Court finds that the defendant's motion for Rule 11 attorney's fees and costs is not well taken. The complaint clearly alleged a claim for relief under Section 1981 as the first cause of action and the remaining "constitutional claims" were within the Section 1981. Further, the Court finds that the defendant was not prejudiced by defending such claims.

IV. CONCLUSION

For the reasons that appear above, the defendant's motion to dismiss is well taken. The plaintiffs' cause of action under Section 1981 is hereby dismissed with prejudice. The plaintiffs' remaining state causes of action are dismissed without prejudice.

IT IS SO ORDERED.

David D. Dowd, Jr.
David D. Dowd, Jr.
U. S. District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

LEOZIE PEARSON, JR. ET AL.	:	CASE NO. C87-1566Y
Plaintiffs	:	JUDGMENT ENTRY
-vs-	:	
HARRISON DUCK	:	
Defendant	:	

For the reasons set forth in the Memorandum Opinion filed contemporaneously with this Judgment Entry, IT IS HEREBY ORDERED, ADJUDGED and DECREED that the defendants motion to dismiss is well taken. The plaintiffs' cause of action under Section 1981 is hereby dismissed with prejudice. The plaintiffs' remaining state causes of action are dismissed without prejudice.

David D. Dowd, Jr.
David D. Dowd, Jr.
U.S. District Judge

RECOMMENDED FOR FULL TEXT PUBLICATION
See. Sixth Circuit Rule 24

No. 88-3106

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

LEOZIE PEARSON, JR. and CAROL PEARSON,
Plaintiffs-Appellants,
v.
HARRISON DUCK,
Defendant-Appellee.

ON APPEAL from the United States District Court for the Northern District of Ohio

---

Decided and Filed April 4, 1989

Before: WELLFORD and BOGGS, Circuit Judges; and SIMPSON, District Judge.*

BOGGS, Circuit Judge. The Pearsons appeal the dismissal of their race discrimination action under Fed. R. Civ. P. 12(b)(6). The trial judge first dismissed on grounds that the suit was time-barred, but then reversed and vacated his judgment, ultimately granting Duck's motion to dismiss on the grounds that the Pearsons had failed to allege a breach of or refusal to contract, which the judge held was necessary to state a claim under 42 U.S.C. § 1981. We affirm.

---

*The Honorable Charles R. Simpson III, United States District Judge for the Western District of Kentucky, sitting by designation.

I

The Pearsons, a black couple, filed suit on June 23, 1987, alleging that Duck, individually and in conspiracy with the City of East Liverpool, deprived them of their rights (as they state them) to "make and enforce contracts, to sue, to be parties, to give evidence, and to receive the benefits of the laws," all of which are protected by 42 U.S.C. § 1981. On the basis of pendent jurisdiction, the Pearsons also brought a state claim for tortious interference with contract, and Mrs. Pearson claimed loss of consortium.

Duck did not file an answer to the complaint, but instead, filed a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) on July 14, 1987. He argued that the § 1981 claim was time-barred, and that the Pearsons failed to state a claim under that statute. Duck attached his own affidavit to this motion. The Pearsons filed a brief in opposition, with an affidavit of their attorney attached. Duck then filed a reply brief; and on August 19, 1987, the Pearsons filed their first discovery request, to which Duck did not respond. Instead, Duck filed a motion to extend the discovery cut-off date. However, prior to ruling on that motion, on September 21, 1987, the trial court dismissed the § 1981 claim on the basis of the statute of limitations, citing this court's decision in *Demery* v. *City of Youngstown*, 818 F.2d 1257 (6th Cir. 1987), which held that a one year statute of limitations should be applied retroactively.

Three days later, on September 24, 1987, the district judge vacated his earlier judgment, based on his being apprised of this court's grant of rehearing and subsequent reversal of its decision regarding the retroactivity of *Demery*. The trial judge ordered the parties to brief the issue of the effect of this reversal. On October 27, 1987, pursuant to Fed. R. Civ. P. 56(f), the Pearsons filed a second affidavit of their attorney, attaching the earlier discovery request to it.

On December 31, 1987, the trial judge granted Duck's motion to dismiss, finding that although the Pearsons' claim was timely filed, the Pearsons had failed to state a claim under § 1981. Consequently, the district judge declined to exercise pendent jurisdiction over the state claims.

II

The events giving rise to this action began when the Pearsons' son, who is black, and Duck's daughter, who is white, became friends in the fall of 1983. Although both sets of parents objected, the children persisted in their friendship. The children would telephone each other occasionally, and when anyone but the other child answered, the children would hang up. The parents met to discuss these phone calls, after which Mr. Pearson claims to have strongly disciplined his son for his behavior, making it clear that these phone calls were to cease. The Pearsons allege that Duck knew or should have known of Pearson's discipline of his son, and that the calls were not made for the purpose of threatening or harassing the Ducks.

The children persisted in their friendship, and Duck subsequently filed a charge with the City of East Liverpool's Law Director and/or City Solicitor, alleging that Mr. Pearson was responsible for harassing phone calls made to the Ducks' residence. On or about September 16, 1983, Mr. Pearson was served with a summons and complaint alleging that he had "made or caused to be made or permitted a telephone call or calls to be made from a telephone under his control *for the purpose* to abuse, threaten, annoy, or harass another person." (emphasis in original). An amended complaint, which charged that the alleged actions were "knowingly" made or "knowingly permitted" to be made, cited Ohio Revised Code § 2917.21(A)(1), violation of which is a first degree misdemeanor.

On March 8, 1984, a trial was held in municipal court, at which Mr. Pearson was found guilty and sentenced to thirty

days in jail and fined $250, though these penalties were suspended. However, costs were charged against Mr. Pearson. On June 25, 1985, the Court of Appeals of Ohio for the Seventh District reversed the conviction on the basis of a speedy trial violation.

The City, which had prosecuted these charges against Pearson, refused to prosecute similar charges against Duck, although Pearson filed a similar complaint with the City. Nearly two years after the final resolution of the criminal charges against Pearson, the Pearsons filed suit in federal court, alleging that Duck and the Law Director and/or City Solicitor conspired to interfere with the Pearsons' contractual rights with the telephone company and with their rights to "enforce contracts, sue, be parties, give evidence, and enjoy the full and equal benefits of the laws," as protected by 42 U.S.C. § 1981. The Pearsons also alleged that they suffered mental anguish, humiliation, stress, anxiety, and embarrassment, and have been "held up to ridicule within their community" as a result of these violations. The City was not named in the suit.

The District Court dismissed, as noted above, reasoning that any attempted interference with the contract between the Pearsons and the telephone company did not result in a disruption of service; there was no breach of contract; and, thus, there was no cause of action under § 1981. The trial judge did not address the Pearsons' argument that the "equal benefit" and "like punishment" provisions of § 1981 were violated; nor did he resolve the pendent state law claims.

III

On appeal, the Pearsons contend that they stated a claim under § 1981, and that their state claims should have been decided by the trial judge. Duck presses his contentions that the suit is time-barred, and that the trial judge was correct in all other respects.

The trial judge found that the Pearsons had failed to state a claim under § 1981 upon which relief could be granted, and thus dismissed the claim under Fed. R. Civ. P. 12(b)(6). Section 1981 states

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. § 1981. The trial judge reasoned that the Pearsons could not show any interference with the contract between themselves and the telephone company, and thus they had failed to state a claim. The Pearsons challenge this reasoning, and, in addition, claim that the judge erred in failing to address their contentions regarding the "full and equal benefit" and "like punishment" clauses of the statute.

A

The trial judge dismissed the civil rights claims based on his finding that the Pearsons' complaint failed to allege facts sufficient to base a claim of interference with contract. Both the words of the statute and our understanding of its intent lead us to the conclusion that the trial judge was not in error. The language of section 1981 clearly focuses on contractual rights. 42 U.S.C. § 1981. Further, courts have often noted that "§ 1981, by its terms, is designed to protect the right to make and enforce contracts . . . ." *London v. Coopers & Lybrand*, 644 F.2d 811, 818 (9th Cir. 1981). Here, there was no specific statement in the Pearsons' complaint of how Duck conspired, planned or attempted to interfere, or actually interfered, with the contract between the Pearsons and the

phone company, or with the Pearsons' right to make such a contract. Thus, we find the trial judge's reasoning persuasive.

B

The Pearsons also claim that the trial judge did not address their claims of violation of the "full and equal benefits" and "like punishment" provisions of section 1981. However, it should be kept in mind that, although the Pearsons have alleged deprivations of the "full and equal benefits" and "like punishment" clauses of § 1981, as well as denial of their rights to sue and be parties, they have named only Duck as a defendant in this suit. If there is an unfairness in the fact that Pearson was prosecuted for conduct apparently similar to that for which Duck was not prosecuted, it cannot be blamed on Duck alone. The Pearsons imply that Duck and the Law Director and/or Solicitor General conspired to deprive them of their rights. However, the Law Director and/or Solicitor General is not named in the suit; and Duck alone could not have *caused* this type of harm.

IV

As much as this court finds many of the actions surrounding this case to be reprehensible, we do not think that the actions brought by the Pearsons are the proper means for redressing the situation. Thus, they have failed to state a claim for which relief can be granted. We therefore AFFIRM the trial court's dismissal of this action.

No. 88-3106

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

LEOZIE PEARSON, JR., ET AL.,	)	
	)	
Plaintiffs-Appellants,	)	
	)	
v.	)	ORDER
	)	
HARRISON DUCK, ET AL.,	)	
	)	
Defendant-Appellee	)	
	)	

BEFORE: WELLFORD and BOGGS, Circuit Judges; and SIMPSON*, United States District Judge

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the

petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

LEONARD GREEN

*Hon. Charles R. Simpson sitting by designation from the Western District of Kentucky

(3)

89-676

No. _____

Supreme Court, U.S.
FILED
NOV 20 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1989

LEOZIE and CAROL PEARSON,
Petitioners,

vs.

HARRISON DUCK,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a criminal misdemeanor conviction of a black defendant following a bench trial by a municipal judge who was not alleged to have engaged in any wrong doing whatsoever, as a matter of law establishes "probable cause" so as to defeat an alleged civil rights malicious prosecution cause of action anchored only under the "like punishment" provision of 42 U.S.C. § 1981, and pursued solely against the private citizen who reported the crime?

2. Whether the allegation of a conspiracy in a civil rights complaint defeats a testifying witness' absolute immunity?

3. Whether a civil rights plaintiff alleging a race-based malicious prosecution cause of action and conspiracy between a white private citizen and black city law director to convict a black private citizen of a misdemeanor crime can properly pursue his claims in the absence of pleading alleged violations of 42 U.S.C. § 1983 or 42 U.S.C. § 1985?

4. Whether Petitioners sufficiently plead their alleged civil rights conspiracy under 42 U.S.C. § 1981?

5. Whether rights secured under the Fifth and Fourteenth Amendments to the United States Constitution are subject to redress under 42 U.S.C. § 1981, rather than 42 U.S.C. § 1983, so as to render meaningless the exhibition of federal or state action?

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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1989

LEOZIE and CAROL PEARSON,
Petitioners,

vs.

HARRISON DUCK,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

OPINIONS BELOW

The unanimous opinion of the United States Court of Appeals for the Sixth Circuit is reproduced in the Petition at App. 106. The unpublished opinion of the United States District Court for the Northern District of Ohio is reproduced at App. 81.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on April 4, 1989. Petitioners' request for rehearing and rehearing en banc was denied by the Court of Appeals by judgment entered July 27, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

Ohio Rev. Code § 2917.21
Telephone harassment.

(A) No person shall knowingly make or cause to be made a telephone call, or knowingly permit a telephone call to be made from a telephone under his control, to another, if the caller does any of the following:

(1) Fails to identify himself to the recipient of the telephone call and

makes the telephone call with purpose to harass, abuse, or annoy any person at the premises to which the telephone call is made...

42 U.S.C. § 1981
Equal rights under the law

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. § 1985(2),(3)
(2) Obstructing justice; intimidating party, witness, or juror.

If two or more persons in any State or Territory conspire. . . for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of

persons, to the equal protection of the laws. . .

(3) Depriving persons of rights or privileges.

If two or more persons in any State or Territory conspire, or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws, or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws. . .

AMENDMENT 14

Section 1. Citizens of the United States.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

AMENDMENT 5

Criminal actions-Provisions concerning-due process of law and just compensation clauses.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against

himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

Petitioner, Leozie Pearson, Jr., a black citizen residing in East Liverpool, Ohio, was served with a criminal summons and complaint for misdemeanor telephone harassment on September 16, 1983.[1]/ The criminal

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[1]/ Ohio Rev. Code § 2917.21(A)(1) provides that it is a first degree misdemeanor to:

> [K]nowingly make or cause to be made a telephone call, or knowingly permit a telephone call to be made from a telephone under his control, to another, if the caller...[f]ails to identify himself to the recipient of the telephone call with purpose to harass, abuse or

FOOTNOTE CONTINUED ON NEXT PAGE

activity was brought to the attention of local authorities by Respondent, Mr. Harrison Duck, a white, self-employed life insurance salesman also residing in East Liverpool, Ohio. The fact harassing telephone calls were placed to the Duck residence from a telephone under the control of Petitioners by their son was established at the criminal trial through a trap device placed on the Duck telephone by the Ohio Bell Telephone Company. The fact harassing calls were indeed made is conceded here (Pet. at 4-5). The

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> annoy any person at the premises to which the telephone call is made...

The owner of a telephone who permits harassing phone calls to be placed is thus just as guilty as the caller.

complaint was brought in the name of the State of Ohio after the City's Law Director, Mr. Hayes Taylor, also a black citizen of East Liverpool found sufficient probable cause to convict. After the state's criminal complaint issued Petitioner Carol Pearson sought to bring similar, and retaliatory criminal charges against Respondent which Taylor refused to prosecute.

Petitioner plead not guilty, and was tried with benefit of counsel before Municipal Judge Paul Tobin. Respondent was subpoenaed to testify as a witness for the state. On March 8, 1984, Petitioner was found guilty of telephone harassment, sentenced to thirty days in jail and fined two-hundred and fifty

dollars, although these penalties were suspended with costs. Petitioner's conviction was reversed on June 25, 1985 due to the state's failure to try him within the time constraints of Ohio's "speedy trial" provisions, Ohio Rev. Code § 2945.71 (App. 109).

For nearly two years, Petitioner sat quietly by, and accepted his alleged malicious prosecution.[2]/ Petitioners then filed a complaint in

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[2]/ By doing so, Petitioner lost his right to pursue abuse of process or malicious prosecution tort type civil claims which are subject to a one-year limitations period in Ohio. See Ohio Rev. Code §2305.11. This limitations period, at the time the federal complaint below was filed, also barred any federal civil rights malicious prosection cause of action under 42 U.S.C. §1983 or §1985. See Carmicle v. Weddle, 555 F.2d 554 (6th Cir. 1977).

federal court naming as the sole defendant Mr. Harrison Duck which alleged four causes of action under apparently five theories of recovery. The federal claim arose under "42 U.S.C. §1981, and the First, Fifth and Fourteenth Amendments to the United States Constitution"(Compl. ¶1), and alleged that because Petitioner was forced to go through the rigors of a criminal trial, and thus expended money for attorneys fees, Respondent interferred on racial grounds with his telephone "contract" in violation of 42 U.S.C. §1981 (Compl. ¶26), although that contract was never breached, discontinued, nor resulted in increased service rates. The remainder of the

claims were pendant, and alleged intentional interference with the telephone contract under state law, loss of consortium on behalf of Carol Pearson, Petitioner's spouse, and loss of consortium of Mrs. Pearson as to her son.

On December 31, 1987, Judge David D. Dowd, Jr. of the Northern District of Ohio dismissed the complaint on Respondent's motion after reviewing Petitioners' pleadings and finding, "[t]here is no indication that the plaintiffs' telephone service was disrupted or discontinued as a result of his criminal charge", "there has been no allegation that the telephone company or the defendant has refused to contract with the plaintiff

on the basis of his race" and, "[t]here is no allegation the plaintiffs have been interferred with in their contractual relationship between the telephone company and the plaintiffs" (App. 100). Petitioners appealed and the Sixth Circuit affirmed for identical reasons, while also speaking to Petitioners allegations that their similar, retaliatory criminal charges against Duck were not pursued by the state. The circuit court held that Respondent acting alone could not have caused this harm.

Petitioners requested rehearing and/or rehearing en banc, drastically changing their theories of recovery in order to bolster their motions for

reconsideration. The Sixth Circuit denied both motions on July 27, 1989.

REASON FOR DENYING DISCRETIONARY REVIEW

I. THE DECISION BY THE SIXTH CIRCUIT DOES NOT PRESENT A CONFLICT WITH THE DECISIONS OF ANY OTHER FEDERAL COURT OF APPEALS OR OF THIS COURT, AND DID NOT DECIDE AN IMPORTANT QUESTION OF FEDERAL LAW NOT ALREADY SETTLED BY THIS COURT.

This is what Petitioners told Judge Dowd about their complaint before him:

> In Defendant's Memorandum at 8 n.4, Defendant misstates Ohio law, regarding the statute of limitations for civil claims of malicious prosecution. While Plaintiffs' actions herein are not analogous to such claims, but are more in the nature of a tortious interference with contract claim, ...

(Br. In Opp. to Mot. Dismiss. at n.2). After the Sixth Circuit decided not to retroactively apply its uniform limitations period for civil rights complaints, Petitioners magically transformed their complaint to one of malicious prosecution without even amending their pleading. This is why Judge Dowd did not address the malicious prosecution nature of this complaint, and why this court should likewise refuse to do so.

With this petition comes the candid, albeit tardy concession that a black person charged and convicted of misdemeanor telephone harassment, such conviction later overturned due to the lack of a speedy trial, cannot state a

claim for interference with a contract violative of those federal rights protected under 42 U.S.C. §1981, due solely to the expenditure of defense attorneys fees where the underlying telephone service was never breached or disrupted (Pet. n.3). The new §1981 theory, be it termed malicious or selective prosecution, is not quite as bizarre as the first, but it is as equally meritless in light of this Court's decisions just last term in Patterson v. McLean Credit Union, 491 U.S. ___, 109 S.Ct. 2363 (1989) and Jett v. Dallas Indep. School Dist., ___ U.S. ___ 57 U.S.L.W. 4858 (1989).

A primary impediment to Petitioners malicious prosecution theory is the

pleading of probable cause. If the underlying malicious prosecution civil rights claim fails, the fact the term "conspiracy" appears in a complaint hardly matters. Terkett v. Lund, 623 F.2d 29, n.4 (7th Cir. 1980). Petitioner expressly plead that he was found guilty of the crimes charged (Compl. ¶13), and that the endless telephone calls to Respondent's residence originated from his house (Id. ¶ 20, 21). Although a conspiracy between the black law director and Respondent to bring these charges against Petitioner may arguably be read somewhere in the complaint, there is absolutely no allegation that Judge Tobin who found Petitioner guilty

engaged in any hanky panky. The fact Petitioner's conviction was overturned on speedy trial grounds (App. 109) does nothing to vitiate probable cause so as to defeat a civil rights malicious prosecution claim. Howell v. Tanner, 650 F.2d 610, n.6 (11th Cir. 1981), cert denied, 456 U.S. 918 (1982); Courtney v. Rice, 46 Ohio App. 3d 133 (1988). To the extent the complaint may allege that the prosecution of their son was malicious, he plead guilty to the charges by the state.

In both Tower v. Glover, 467 U.S. 914 (1984) and Dennis v. Sparks, 449 U.S. 24 (1980)(Pet. 19), due process actions under 42 U.S.C. § 1983--not §1981--the civil rights plaintiffs alleged that the judge was inextricably

intertwined in the conspiracy, thereby stating a prima facie due process violation. 449 U.S. at 25; 467 U.S. at 916. That is not the case here, even assuming the "equal benefits" and "like punishment" provisions of § 1981 apply.[3]/ Tower and Dennis are also distinguishable because here Petitioners never alleged the criminal charges were filed pursuant to a conspiracy (Compl. ¶9), never alleged the criminal summons and complaint was issued as part of a conspiracy (Id. at 10), never alleged

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[3]/ These provisions of § 1981 originated from the post-civil war Black Codes which by statute proscribed different and more onerous penalties for violations of laws for blacks than whites. No such statute was ever alleged to exist here, nor was the punishment imposed by Judge Tobin alleged to be discriminatory.

the criminal complaint was filed in a conspiracy (Id. at 11), and never alleged the conviction entered by the Municipal Judge was part of a conspiracy. This conscious decision was undertaken so as to skirt the limitations period which barred a civil rights malicious prosecution claim in Ohio. Supra, n.2. To now allow Petitioners to re-cast their claims here as a basis for discretionary review is unprecedented.

Tower and Dennis also involved conspiracies where the private co-conspirator was not entitled to any immunity. Testifying witnesses in criminal cases enjoy absolute immunity. Briscoe v. Lahue, 460 U.S. 325 (1983). An alleged conspiracy does nothing to

change this result. Briscoe n.7; Moses v. Parkwatikar, 813 F.2d 891 (8th Cir. 1987), cert. denied, 108 S.Ct. 108 (1987). Also, in Tower where the underlying action was criminal and brought in the name of the state, all state officials were in fact joined as defendants. 467 U.S. 918.

As to the selective prosecution nature of the complaint, Petitioners once again plead themselves from recovery. Paragraph twenty-four alleged that "The City of East Liverpool, by and

through Taylor and Payne"[4] / knew Respondent's daughter was making calls "as described in paragraph twenty (20), but refused to process [similar] charges made by Plaintiffs..." (Compl. ¶24). Paragraph twenty, in turn, avered that any calls made by Respondent's white daughter to Petitioners "...were not made with a purpose to abuse, threaten, annoy or harass another person" (Compl. ¶20). What Petitioners asked for below was a decision that the City's election,

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[4] / There was no allegation that the City's, Payne's or Taylor's decision not to prosecute was in conspiracy with Respondent. For this reason, the Sixth Circuit's decision regarding failure to name and join these defendants was proper and not at odds with Dennis or Tower. Private citizens in Ohio have no authority to decide which cases to prosecute and which not. Ohio Rev. Code § 309.08.

conspiratorial or otherwise, not to prosecute Respondent's white daughter for conduct admittedly not violative of Ohio Rev. Code § 2917.21(A) somehow violated § 1981. Judge Dowd correctly ignored this absurd theory. Moreover, it has been routinely held that there is no civil rights guarantee to have criminal charges brought to prosecution, even if Petitioners had plead Respondent's daughter's actions violated state law. See Wellman v. State of W.Va., 637 F. Supp. 135, 138 (D. W.Va. 1986)("Adding conspiracy with private persons to his claim against the prosecutor for failure tc prosecute will not make the failure to prosecute actionable", granting 12(B) dismissal);

Statler v. Johnson, 857 F.2d 224, 227 (4th Cir. 1988)(dismissing conspiracy not to prosecute under §1983).

A more serious problem with this complaint is this Court's recent interpretations of § 1981. In Jett v. Dallas Ind. School Dist., supra, the Court examined whether § 1981 could provide an independent basis for liability against state actors in the face of § 1983. The Court's opinion is worth repeating here:

> We think the history of the 1866 Act and the 1871 Act recounted above indicates that Congress intended that the explicit remedial provisions of § 1983 be controlling in the context of damages actions brought against state actors alleging violation of the rights declared in § 1981. That we have read § 1 of the 1866 Act to reach private action and

have implied a damages remedy to effectuate the declaration of rights contained in that provision does not authorize us to do so in the context of the "state action" portion of § 1981, where Congress has established its own remedial scheme. In the context of the application of § 1981 and § 1982 to private actors; we "had no choice but to hold that aggrieved individuals could enforce this prohibition, for there existed no other remedy to address such violations of the statute." Cannon, 441 U.S. at 728 (White, J. dissenting)(emphasis added; footnote omitted). That is manifestly not the case here, and whatever the limits of the judicial power to imply or create remedies, it has long been the law that such power should not be exercised in the face of an express decision by Congress concerning the scope of remedies available under a particular statute. See National Railroad Passenger Corp. v. National Assn. of Railroad Passengers, 414 U.S. 453, 458 (1974)("A frequently stated principle of statutory construction is that when legislation expressly provides a particular remedy or remedies, courts should not expand the

coverage of the statute to subsume other remedies").

57 U.S.L.W. 4858, 4866-67. Accord Patterson v. McLean Credit Union, ___ U.S. ___, 109 S.Ct. 2363, 2375 (1989)("We should be reluctant, however, to read an earlier statute broadly where the result is to circumvent the detailed remedial scheme constructed in a latter statute"). The statute for pursuing allegations of a civil rights conspiracy is clearly expressed under 42 U.S.C. § 1985 (2), (3). Those sections provide no substantive rights of their own but only a vehicle to redress violation of other constitutional and civil rights. Great American Fed. S&L v. Novotny, 442 U.S. 366, 376 (1985). Section 1985 would be rendered a "dead letter"

[Patterson, 109 S.Ct. at 2375] if Petitioner is free to pursue an alleged civil rights conspiracy without invoking § 1985.

Even so, the pleading in this case falls well short of the specificity required to state a claim. This court has already approved of a 12(B) dismissal of an identical, conclusory civil rights conspiracy in Briscoe v. LaHue, 663 F.2d 713, 723 (7th Cir. 1981). See Papasan v. Allan, 478 U.S. 265, 286 (1986)("Although for purposes of this motion to dismiss we must take all the factual allegations in the complaint as true, we are not bound to accept as true a legal conclusion couched as a factual allegation" citing Briscoe). The word

"conspiracy" is buried in a single paragraph of this complaint just prior to Petitioners' verbatim reiteration of § 1981 (Compl. ¶26).[5]/ The circuit court found an insufficiency of pleading a conspiracy (App. 110). This is the precise type of "conspiracy" pleading subject to summary dismissal. See Hale v. Harney, 786 F.2d 688 (5th Cir. 1986)(dismissal of civil rights

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[5]/ The only allegation of "state action" appears at ¶9 where Petitioners alleged Respondent "act[ed] under color of state law" in filing the criminal charges with the City or its officials. Of course, simply reporting a crime is not the equivalent of state action. Lee v. Town of Estes Park, Colo., 820 F.2d 1112, 1115 (10th Cir. 1987). Those courts that have considered the issue have found a state action component to the "like benefit" provisions of § 1981. Mahone v. Waddle, 564 F.2d 1018, 1029 (3d Cir. 1977), cert. denied, 438 U.S. 904 (1978).

conspiracy between judge and wife granted due to conclusory pleading); Miller v. Duffin, 637 F.Supp. 496 (N.D. Ill. 1986); Brinkmann v. Johnston, 793 F.2d 111 (5th Cir. 1986); Manis v. Sterling, 862 F.2d 679 (8th Cir. 1988); McCarthy v. Mayo, 827 F.2d 1310 (9th Cir. 1987).

The constitutional claims under the Fifth and Fourteenth Amendments (Pet. n.4) are interesting because acceptance of them would obliterate the necessity of ever again exhibiting "state" or "federal" action in order to state a claim for relief. It is important to remember that the exclusive predicate of this complaint was § 1981. This court has previously held 42 U.S.C. § 1983,

while providing no substantive rights of its own, was passed precisely to remedy deprivations of constitutional and civil rights. Baker v. McCollan, 443 U.S. 137 (1979). If Petitioners are correct, and these constitutional provisions are now subject to redress under § 1981, § 1983 has also become a "dead letter". Moreover, acceptance of this position would effectively overrule The Civil Rights Cases, 109 U.S. 3 (1883) and Shelley v. Kramer, 334 U.S. 1 (1948) since the "state action" component of these constitutional provisions would disappear under § 1981 which Petitioners

contend reaches purely private conduct (Pet. 24).[6]/

CONCLUSION

The petition should be denied as it presents an action not in conflict among the circuits or this Court, and presents

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6/ Petitioners boldly request that the court consider remand of their pendant claims if this court were to accept their Petition, and if this court were further to reverse the opinions of both lower courts (Pet. n.3). This request is untenable considering that Petitioners have not appealed here their "interference with contract" § 1981 civil rights claim (Id.), and Count II was precisely a pendant "interference with contract" claim. The remaining claims were for loss of consortium which the federal courts have conclusively established may not spring from alleged civil rights violations. Walters v. Village of Oak Lawn, 548 F. Supp. 417 (D.C. Ill. 1985); Tauriac v. Polaroid Corp., 48 Fair Empl. Prac. Cas.(BNA) 1256 (D. Mass. 1989). These claims have already been pursued through the state courts.

an issue not already decided by this Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing Brief of Respondent in Opposition was served on Dennis Haines, Fourth Floor, Dollar Bank Bldg., P. O. Box 849, Youngstown, OH 44501, by certified mail, return receipt requested, this 22nd day of November, 1989.

John E. Holcomb